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CASES

ON

QUASI-CONTRACTS

EDITED WITH NOTES AND REFERENCES

BY

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“Justice is the great interest of man on earth.”

Webster on Justice Story (1845).

“Justice, moral fitness, and public convenience,
when applied to a new subject, make common law
without a precedent; much more, when received
and approved by usage.”

Per Willes, J., in Millar v. Taylor

(1769) 4 Burr. 2312.

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PREFACE

THE present collection of cases on Quasi-Contracts is prepared to meet the needs of classroom instruction of not more than three hours a week during half a year.

While a case-book as such can make little or no pretence to originality in any way, attention is called to the historical treatment of the subject in the first eighteen pages of the book, whereby the quasi-contract of the present day is treated as a natural, if unconscious, development of the quasi-contract of the Roman Law. To make clear this connection, frequent reference is made in the footnotes to the Roman and modern Civil Law of the Continent and Spanish-American States. It is hoped that the law of Quasi-Contract gains in importance and precision, as it certainly does in antiquity and dignity, by treatment as a part of a larger and well-nigh universal system of law.

In the next place, the arrangement is different from that with which the public is familiar. The present collection follows, and necessarily, Mr. Ames's classification of the nature and extent of quasi-contract, as did Judge Keener, both in his Cases and Treatise; but the non-contractual aspect of the subject is accentuated from the very beginning. After the introductory matter of Book I., the obligation is considered as existing, independent of any contract, and, indeed, its existence is in itself the negation of contract. As, for example, the obligation of restitution when defendant acquired the plaintiff's property by a tort, or where the money in question was paid by the plaintiff under duress, legal or equitable, or under compulsion of legal process. Then recovery is considered when a contract exists, but the contract itself is due to mistake of law or fact. In the next place, the question of recovery in quasi-contract is considered when the contract is impossible of performance; when the contract is illegal; when the contract is unenforceable under the Statute of Frauds. The collection ends with what may be considered the culmination of Quasi-Contract, namely: the repudiation of the contract

by defendant or plaintiff, as in *Britton v. Turner* (page 753), and a recovery is sought on a *quantum meruit* notwithstanding the legal as well as practical existence of the contract. An examination of the full and detailed table of contents will render superfluous any further analysis of the arrangement and underlying theory of the collection.

In the third place, it is hoped that the annotations and references in the footnotes will make it possible for the serious-minded student to carry his studies beyond the English well into the foreign law of quasi-contract. The annotations are not, except in rare instances, merely cumulative; but aim rather to call attention to various refinements and subtleties of the doctrine which it was impossible to set forth at large in the text.

The publishers placed Professor Keener's Cases at the editor's disposal, and the Treatise, as well as the Cases were constantly consulted in preparing the present collection, so that it is believed that no really leading case contained in either work has been overlooked. If not printed at large in the text, it will probably be found in the footnotes by way of annotation. But unless the case seemed indispensable, the editor preferred, as a rule, shorter cases, selected with reference to the geography of the country as a whole. New England and the Atlantic seaboard have not been neglected; but a goodly number of cases were chosen from the Middle West, and Texas and the Pacific coast are represented. Louisiana and Scotland were drawn upon especially for the civil law in an English garb.

Had Judge Keener's collection been a half to a third shorter, the present editor would not have undertaken the comparatively thankless and irksome compilation of a case-book.

The editor takes this opportunity of thanking publicly the following friends, through whose kindness and courtesy the labors of selection and annotation were much lightened:

Professor James Barr Ames, Dean of the Harvard Law School, who placed his numerous manuscript annotations and notes at the editor's disposal. A glance at the text will show the indebtedness, and whenever a note is printed in the exact language of Mr. Ames, credit is duly given. Professor Wambaugh, also of the Harvard Law School, and Professor Kirchwey, Dean of the Columbia School of Law, were equally kind in this particular, and the book owes not a little to their friendly suggestions.

And finally, the editor tenders his sincere thanks to Christopher B.

Wyatt, Esq., of the New York Bar, for valuable assistance in the section devoted to illegal contracts, and to J. Reuben Clark, Jr., also of the New York Bar, whose aid extended from the beginning to the end of the book, and whose devotion in the matter of annotation and verification it is a duty as well as a pleasure to acknowledge.

JAMES BROWN SCOTT.

COLUMBIA UNIVERSITY,
September 1, 1905.

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CASES ON QUASI-CONTRACTS

BOOK I.

THE SOURCES, EXTENT AND NATURE OF QUASI-CONTRACTS.

CHAPTER I.

SOURCES OF THE OBLIGATIONS.

INSTITUTES OF JUSTINIAN (533 A.D.), BOOK III., TITLE XXVII.

De Obligationibus Quasi ex Contractu.

HAVING enumerated the different kinds of contracts, let us now examine those obligations also which do not originate, properly speaking, in contract, but which, as they do not arise from a delict, seem to be quasi-contractual.

1. Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better.

2. Guardians again, who can be sued by the action on guardian-

ship, cannot properly be said to be bound by contract, for there is no contract between guardian and ward: but their obligation, as it certainly does not originate in delict, may be said to be quasi-contractual. In this case too each party has a remedy against the other: not only can the ward sue the guardian directly on the guardianship, but the guardian can also sue the ward by the contrary action of the same name, if he has either incurred any outlay in managing the ward's property, or bound himself on his behalf, or pledged his own property as security for the ward's creditors.

3. Again, where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses: here the defendant cannot properly be said to be bound by contract, for there has been no contract made between the parties; but as his obligation is not based on delict, it may be said to be quasi-contractual.

4. The case is exactly the same between joint heirs, one of whom is liable to be sued by the other on one of these grounds in an action for partition of the inheritance.

5. So too the obligation of an heir to discharge legacies cannot properly be called contractual, for it cannot be said that the legatee has contracted at all with either the heir or the testator: yet, as the heir is not bound by a delict, his obligation would seem to be quasi-contractual.

6. Again, a person to whom money not owed is paid by mistake is thereby laid under a quasi-contractual obligation; an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom money is thus paid is laid under an obligation exactly as if he had taken a loan for consumption, and therefore he is liable to a condiction.

7. Under certain circumstances money which is not owed, and which is paid by mistake, is not recoverable; the rule of the older lawyers on this point being that wherever a defendant's denial of his obligation is punished by duplication of the damages to be recovered—as in actions under the *lex Aquilia*, and for the recovery of a legacy—he cannot get the money back on this plea. The older lawyers however applied this rule only to such legacies of specific sums or objects as were given by condemnation; but by our constitution, by which we have assimilated legacies and trust bequests, we have made this duplication of damages on denial an incident of all actions for their recovery, provided the legatee or beneficiary is a church.

or other holy place honored for its devotion to religion and piety. Such legacies, although paid when not due, cannot be reclaimed.¹

¹J. B. Moyle: *Imperatoris Iustianiani Institutiones* (2 vols. 4th ed. 1904).

On the subject of Quasi-Contracts in the Roman Law, see Ramm: *Der Quasicontract nach den Quellen und sein Werth für Wissenschaft und Gesetzgebung* (1882); Girard: *Manuel*, pp. 604-633.

In the earlier periods of Roman law the source of an obligation was twofold: *omnis enim obligatio vel ex contractu nascitur vel ex delicto* (Gaius, 3. 88). The development by which a quasi-contract or quasi delicto was added to the primitive conception of an obligation is given by Girard (*Manuel de Droit Romain*):

“Les jurisconsultes de la bonne époque se contentaient en général de mettre pêle-mêle, dans une même catégorie un peu vague, ces obligations qui ne naissaient ni de contrats ni de délits en disant simplement qu’elles naissaient de modes diverses (*varie causarum figura*. Gaius *D. 44, 7, De O. et A., 1, pr.: obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam jure ex variis causarum figuris*). Gaius est, à notre connaissance, le seul à avoir proposé une autre division, devenue beaucoup plus célèbre parce qu’elle a passé dans les Institutes de Justinian: celle qui met à côté des obligations contractuelles les obligations quasi-contractuelles (*obligationes quæ quasi ex contractu nascuntur*, où le débiteur *quasi ex contractu tenetur*) et à côté des obligations délictuelles les obligations quasi-délictuelles (*obligationes quæ quasi ex delicto nascuntur*, où le débiteur *quasi ex delicto tenetur*. Gaius, *D., 44, 7, De O. et A., 5, Inst., 3, 13, De obl., 2; 3, 27, De obligationibus quasi ex contractu; 4, 5, De obligationibus quæ quasi ex delicto nascuntur*). Cette division, plus compliquée, est théoriquement critiquable et n’a même pas le mérite d’englober aisément l’ensemble des obligations” (3d ed. (1901). pp. 387. 388).

And in a note to this passage, the learned author points out that the division is not only too narrow, but that the expression is badly chosen. “On peut dire,” he says, “comme fait parfois Gaius, que le débiteur est tenu (*tenetur*) *quasi ex contractu*: il est obligé de la même façon qu’en vertu d’un contrat; mais il est très faux de dire, comme Gaius fait ailleurs et comme fait Justinien après lui, que l’obligation naît (*nascitur*) *quasi ex contractu*, de parler avec le Code civil de quasi-contrat: le caractère du contrat est l’accord de volontés, celui du prétendu quasi-contrat son absence, il n’y a donc rien qui se ressemblé moins que leurs manières de naître.”

For the various questions of Roman Law the student is referred to Windscheid’s *Lehrbuch des Pandektenrechts* (3 vols.), as the most scientific and satisfactory German work on the subject, where the whole literature is given on the various topics. Of this work, the eighth edition (1900-1901), by Dr. Theodor Kipp, is the most valuable, as it incorporates in the text the corresponding sections of the German Code (*Das Bürgerliche Gesetzbuch*), which went into effect in 1900.

Hunter’s *Roman Law in the Order of a Code* (3d ed., 1897); Ledlie’s translation of Sohm’s *Institutes of Roman Law* (2d ed., 1901) will answer the needs of the English reader. See the section on Quasi-Contracts, pp. 423-429. Robinson’s *Selections from the Public and Private Law of the Romans* (1905) is an excellent little work and might well be used in connection with any text book on Roman Law.—En.

HENRY OF BRACTON: LAWS AND CUSTOMS OF ENGLAND.

(Book III.. Fol. 100, ¶ 10.)

HAVING spoken of obligations which arise ex contractu, it is now necessary to consider obligations which arise quasi ex contractu. And it should be noted that actions arise quasi ex contractu in cases of negotiorum gestio, wardship, the division of common property, the distribution of an inheritance, on an action on a testament, a suit to recover money paid by mistake, and the like.¹

MOSES v. MACFERLAN.

KING'S BENCH, 1760.

[2 *Burrow*, 1005.²]

MOSES had four Notes of one *Chapman Jacob*, dated 11th July 1757, Value 30s. each. *Macpherlan*. 7th November 1758, prevailed upon *Moses*, to indorse these Notes to him, upon an express written Agreement, to indemnify *Moses* against all Consequences of such Indorsement, and that no Suit should be brought against *Moses* the Indorser, but only against *Jacob* the Drawer. Notwithstanding which, *Macpherlan* brought four Actions in the Court of Conscience, upon these very Notes against *Moses*; and, upon Trial of the first, the Commissioners refused to go into any Evidence of this Agreement: whereupon the Plaintiff recovered, and the Defendant paid the whole £6. And now *Moses*, the Defendant below, brought *Indebitatus assumpsit* against *Macpherlan*, the Plaintiff below, for Money had and received to his Use, and obtained a Verdict for £6 subject to the Opinion of this Court.

Morton (for Defendant *Macpherlan*) argued, that *Indebitatus assumpsit* would not lie upon a Judgment recovered in an inferior Court of a final Jurisdiction; and cited Cro. Jac. 218. and 1 Bulstr. 152. The Remedy in this Case being a special Action on the Case, for Breach of the Agreement.

¹For the relation of Bracton to Roman and English Law, see Gütterboeck's "Bracton and his Relation to the Roman Law," as translated into English by Brinton Cox; 2 Pollock & Maitland's History of English Law, 206-210; Hunter's Roman Law (3d ed.) 109-116.

See also, Howe's Studies in the Civil Law, 172-178.—Ed.

²This statement of the case, including the arguments of counsel and of the judges, is taken from 1 Wm. Blackstone's Reports, 219.—Ed.

Norton, *contra*, that this Action would well lie, the Remedy by Action on *Assumpsit* being of the most liberal and beneficial Kind.

On the Argument, MANSFIELD Chief Justice doubted if the Action would lie, after a Judgment in the Court of Conscience; but wished to extend this remedial Action as far as might be: To which DENISON Justice agreed, and inclined strongly that the Action would lie. FOSTER Justice was afraid of the Consequences of overhauling the Judgment of a Court of a competent Jurisdiction. WILMOT Justice was clear that the Action would not lie; because this Action always arises from a Contract of Repayment, implied by Law; and it would be absurd, if the Law were to raise an Implication in one Court, contrary to its own express Judgment in another Court. He compared this Action to the Title *de Solutione Indebiti*. Inst. 3. 28. b. and *de Condictione Indebiti* in Cod. and Dig. L. iv, tit. 5. *pecuniæ per errorem, non ex causâ judicati, solutæ esse repetitionem condictiois non ambigitur*, in which there was always an Exception *Causæ Judicati*; and this Reason given for it, *Ne Actiones resuscitentur*.

The court, having heard the counsel on both sides, took time to advise.

Lord MANSFIELD now delivered their unanimous opinion, in favor of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money; and the jury accordingly found a verdict for the £6, subject to the opinion of the court upon this question, "Whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The 1st objection is, "That an action of debt would not lie here; and no *assumpsit* will lie where an action of debt may not be brought;" some sayings at *nisi prius*, reported by note-takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it.

It is much more plausible to say, "That where debt lies an action upon the case ought not to be brought." And that was the point relied upon in Slade's case (4 Co. 92); but the rule then settled and followed ever since is, "That an action of *assumpsit* will lie in many cases where debt lies, and in many where it does not lie."

A main inducement, originally, for encouraging actions of *assumpsit* was, "to take away the wager of law;" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

2d Objection. "That no *assumpsit* lies except upon an express or implied contract; but here it is impossible to presume any contract to refund money which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of

natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it).

This species of assumpsit ("for money had and received to the plaintiff's use") lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had by law authority to receive from such third person.

3d Objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear "that the merits of a judgment can never be over-hauled by an original suit, either at law or in equity." Till the judgment is set aside or reversed, it is conclusive, as to the subject-matter of it, to all intents and purposes.

But the ground of this action is consistent with the judgment of the Court of Conscience; it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff, which indorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence.

It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We cannot correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by way of defence against a promissory note for 30s., they might go into agreements and transactions of a great value; and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not "that the judgment was wrong," but "that (for a reason which the now plaintiff could not avail himself of against that judgment) the defendant ought not in justice to keep the money." And at Guildhall I declared very particularly, "that the merits of a question determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatsoever."

Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.

Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser, who knew nothing of such payment.

Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further; for the admission "that, unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or, upon the agreement itself, that, besides refunding the money, he may pay the costs and expenses the plaintiff was put to.

This brings the whole to the question saved at *nisi prius*, viz.: "Whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement."

One great benefit which arises to suitors from the nature of this action is, that the plaintiff needs not state the special circumstances from which he concludes "that, *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him;" he may declare generally "that the money was received to his use," and make out his case at the trial.

This is equally beneficial to the defendant. It is the most favorable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue: he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it.

If the plaintiff elects to proceed in this favorable way, it is a bar to his bringing another action upon the agreement; though he might recover more upon the agreement than he can by this form of action. And therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

But the point has been long settled, and there have been many precedents; I will mention to you one only, which was very solemnly considered. It was the case of *Dutch v. Warren*, M. 7 G. 1 C. B. An action upon the case for money had and received to the plaintiff's use.

The case was as follows: Upon the 18th of August, 1720, on payment of £262 10s. by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the Welsh copper mines, at the opening of the books; and for security of his so doing gave him this note: "18th of August, 1720. I do hereby acknowledge to have received of Philip Dutch £262 10s. as a consideration for the purchase of five shares; which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open, being five shares in the Welsh copper mines. Witness my hand, Robert Warren." The books were opened on the 22d of the said month of August, when Dutch requested Warren to transfer

to him the said five shares; which he refused to do, and told the plaintiff "he might take his remedy." Whereupon the plaintiff brought this action for the consideration-money paid by him. And an objection was taken at the trial, "that this action upon the case, for money had and received to the plaintiff's use, would not lie; but that the action should have been brought for the non-performance of the contract." This objection was overruled by the CHIEF JUSTICE, who notwithstanding left it to the consideration of the jury, Whether they would not make the price of the said stock as it was upon the 22d of August, when it should have been delivered, the measure of the damages; which they did, and gave the plaintiff but £175 damages.

And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought; and that the recovery was right, being not for the whole money paid, but for the damages in not transferring the stock at the time; which was a loss to the plaintiff, and an advantage to the defendant, who was a receiver of the difference-money, to the plaintiff's use.

The court said that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.

The damages recovered in that case show the liberality with which this kind of action is considered; for though the defendant received from the plaintiff £262 10s., yet the difference-money only, of £175, was retained by him against conscience; and therefore the plaintiff, *ex æquo et bono*, ought to recover no more; agreeable to the rule of the Roman law: "*Quod condictio indebiti non datur ultra, quam locupletior factus est qui accepit.*"

If the five shares had been of much more value, yet the plaintiff could only have recovered the £262 10s. by this form of action.

The notion of fraud holds much more strongly in the present case than in that, for here it is express. The indorsement which enabled the defendant to recover was got by fraud and falsehood for one purpose, and abused to another.

This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law,—as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these

cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion. That the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action to recover the £6 which the defendant got and kept from him iniquitously.

*Rule. That the postea be delivered to the plaintiff.*¹

In discussing the source of Lord Mansfield's law, Sir William D. Evans says, in the appendix to Pothier on Obligations (1806) Vol. II. pp. 321-324:

But if there is any subject to which the doctrine of an universality of principle peculiarly applies, it is that of reclaiming money unduly paid; not only upon the ground that there is no subject in its nature, more wholly referable to the general rules of natural justice, as distinct from the laws founded upon local habit or municipal institution, but also upon the more favourite ground of precedent itself. It will be generally agreed that the system of law upon this subject, as administered in *England*, is chiefly to be deduced from the determination of Lord MANSFIELD, and that the few cases respecting it of an earlier date are not of sufficient importance to form any regular system. But Lord MANSFIELD'S own views upon the subject are peculiarly referable to the principles of universal jurisprudence, as illustrated and embodied in the *Roman* law, and the whole series of his conduct respecting it is a continued precedent of his recurrence to those principles. In the leading case of *Moses v. Macfarlane*, in which he embraced the earliest opportunity that occurred to him, of giving an exposition of the grounds and nature of the action for money had and received, he enters diffusely into the general doctrine respecting

¹"Although the case of *Moses v. Macferlan* is constantly spoken of to-day as if it were overruled, the writer knows of no case in which any doctrine differing from the decision of *Moses v. Macferlan* has been laid down. Undoubtedly Lord MANSFIELD, in that case, used many expressions which would not represent the law of to-day, but they were mere *obiter dicta*, and should not be confused with the ground upon which Lord MANSFIELD in fact rested the decision in favor of the plaintiff." Keener's *Treatise on Quasi-Contracts*, 415.

it, and states several principles which have ever since been looked up to as the standard of authority (even by those who think that in the particular application of these principles, he did not allow sufficient consequence to others by which they ought properly to have been restricted and controlled). But it will scarcely be contended that he founded the materials of his exposition in any preceding volume of *Reports*; whereas a very slight comparison will evince the source of it to have been the judicial wisdom of ancient *Rome*:

This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It is only for money which, ex æquo et bono, the defendant ought to refund.

It does not lie for money paid by the plaintiff, which is demanded of him as payable in point of honour and honesty, though it could not have been recovered from him by any course of law.

As in payment of a debt, barred by the statute of limitations.

Hæc conductio ex bono et æquo introducta, quod alterius apud alterum sine causa deprehenditur, revocari consuevit. l. 66. ff. Lib. 12 Tit. 6. de Cond. Indeb.

Naturales obligationes non eo solo æstimantur, si actio aliqua earum nomine competit: verum etiam eo si soluta pecunia repeti non possit. ff. Lib. 44. Tit. 7 de Oblig. et Actio. l. 10. Lib. 46. Tit. 1. de fide jussoribus, l. 16. § 3.

Naturaliter etiam servus obligatur, et ideo si quis ejus nomine solvat, vel ipse manumissus ex peculio, repeti non poterit. l. 13. de Conditione Indebiti. ff. 12. Tit. 6.

Naturale autem debitum in hac causa pro vero debito habetur, eoque etsi exigi non potest; solutum tamen non repetitur. Vin-
nius. Ad. Inst. Lib. 3. Tit. 28. 4. 6.

Julianus verum debitorem post litem contestatam, manente adhuc judicio, negabat solventem repetere posse: quia nec absolutus nec condemnatus repetere posset, licet enim absolutus sit, natura tamen debitor *permanet*. l. 60. de Cond. Indeb.

Or contracted during his infancy.

Huc item plerique referunt exceptionem Senatus Consulti Macedoniani; nam et filius familias si mutuam pecuniam acceperit, et pater familias peperam solverit, non repetit. Vinnius. Quonian, naturalis obligatio manet. ff. Lib. 14. Tit. 6. de Set. Maced. l. 9. 10.

It lies for money paid by mistake.

Quod indebitum per errorem solvitur, aut ipsum aut tantumden repetitur, l. 7. de Cond. Indeb.

Is cui quis per errorem non debitum, solvit, quasi ex contractu debere videtur. Inst. Lib. 3. Tit. 28.

Or upon a consideration which happens to fail.

The whole title in the digest, de *Conditioni Causa data, Causa, non secuta*, is an amplified view of this proposition.

Or for money got by imposition, express or implied, or extortion, or oppression.

Si quis dolo malo aliquem induxerit, aut metu illato coegerit, ut promitterit non possum adduci ut credam, solutum ex his causis retineri posse. Vinnius.

Ex ea stipulatione, quæ per vim extorta esset, si exacta esset pecunia, repetitionem esse constat. ff. Lib. 12. Tit. 5 de Cond. ob Turp. vel Injust. Caus. l. 7.

Or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons, under these circumstances.

Si naturalis obligatio jure civili improbata sit, aut destituta juris civilis auxilio, qualis est mulieris intercedentis. l. 16. § 1. ad. Set. Maced. prodigi promittentes. l. 6. de Verb. Oblig. pupilli sine tutoris contractu, licet hæc admittunt accessiones, ea non attendetur et perinde repetitio datur, ac si quod ex causa solutum est nullo jure debitum esset. Vinnius, 22.

In one word the gift of this action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.

The damages recovered in the case of *Dutch v. Warren*, show the liberality of this kind of action: for though the defendant received considerably more, yet the difference only was retained against conscience, and therefore the plaintiff *ex æquo et bono* could recover no more,

Hoc natura æquum est neminem cum alterius detrimento, fieri locupletiores. l. 14. de Cond. Indeb.

agreeably to the rule of the Roman law: *Quod condictio indebiti non datur ultra quam locupletior est factus qui accepit.*

ADAM SMITH: LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS.
(1763.)

(Part 1, Justice, § 10, pp. 134, 135.)

QUASI-CONTRACT is founded on the duty of restitution. If you find a watch on the way, you are obliged to restore it by the right of property, because a man loses not property with possession. But if you and I balance accounts, and you pay me a sum which both think due, but you afterwards find you did not owe that sum, how will you claim it? You cannot ask it as your property, for you alienated that sum, nor can you claim it by contract, for there never was one made between us (*nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahatur potius negotium quam contrahatur. Inst. lib. 111. tit. xxvii. § 6*), yet it is evident that I am a gainer by your loss, and therefore restitution is due.

In the same manner, if a man was called away by a sudden order of the state without leaving an attorney to manage a lawsuit that he had going on, and a friend undertakes this office without commission, as the defence is necessary, and the undertaking it prudent, restitution of his expenses are due. On the same principle were founded the *actiones contrariae* of the Roman law. If you lent me a horse which had cost me extraordinary expenses, by the contract commodate you could redemand your horse in the same [state] in which you lent him,

but I could claim my extraordinary expenses by an *actio contraria*. The same principle takes place in many other cases. If a person borrows money, and gets three of his acquaintances sureties for him, jointly and severally, and if he turn bankrupt, the creditor pursues the ablest surety, who has a claim by the duty of restitution on the other two for their thirds. The Scotch law carries this still farther. If a bankrupt had two estates, and two creditors, A and B: A has a security on both estates, B has security only on the best: A has a liberty of drawing his money from either estate he pleases, and draws from that on which B has his security. As B in this case is cut out, the law obliges A to give up his security on the other estate to B. The same was the case in the Roman law with regard to tutory.¹

SIR WILLIAM D. EVANS: AN ESSAY ON THE ACTION FOR MONEY HAD AND RECEIVED.—INTRODUCTION (1802).

If one person receives a sum of money for the purpose of paying it over to another, his obligation to make such payment is too plain to require any comment. The general obligation to refund money, which has been paid under a mistake, or obtained by fraud or extortion, or given for a purpose to which it has not been applied, is equally evident. According to the Roman law, actions of different denominations were adapted to the several cases, in which such payment was unduly made. The English law has adopted a general supposition, that the money which ought to be refunded was received for the use of the party by whom it was paid, and that the person receiving it made a promise to pay it on request. And the action used for this purpose is called AN ACTION FOR MONEY HAD AND RECEIVED. This action has also an extensive latitude as a mode of trying adverse rights; for if a person sells my property under a claim of title or otherwise, I may in point of form consider him as my agent and charge him with having received the money for my use and made a promise to pay. I have no intention at present of examining the different cases in which this is

¹The lectures from which the above excerpt is printed, were delivered by Adam Smith to his classes in the University of Glasgow and reported by a student in 1763. (See the valuable introduction of the editor, Mr. Edwin Cannan, in which he recounts the discovery in 1895 of these interesting and exceedingly valuable lectures.)

It may be of interest to note that, at the very time Adam Smith was discoursing theoretically on Quasi-Contract to his classes in Glasgow, his fellow Scot—the great Lord Mansfield—like him deeply read and learned in the Roman Law, was making the law of Quasi-Contract from the bench. See *Moses v. Macferlan* (1760) 1 Wm. Blackstone, 219 and 2 Burrow, 1005 *ante*.—ED.

the proper form of action, where it is agreed that a right of action in some shape certainly exists. I shall only observe, that the extension of it has of late years been considerably favoured, and a party may now obtain redress upon this general allegation, in many cases where it was formerly deemed necessary to make a particular and circumstantial statement of his demand, whereby the danger of failing from an error in the statement was considerably increased: and in the cases where a person has his election to bring his action, as for a wrong, or, waiving the injury, to consider the conversion of his property as an agency, and an obligation to account, he must act consistently throughout, and not treat the same act as licit for one purpose, and tortious for another. If I charge a man with converting my corn or timber to his own use, and sue him for damages, it will be no justification that I owe him a sum of money; but if I proceed against him in an action for money had and received, in order to recover the produce, he may set off his debt, and I cannot oppose the argument that his being my creditor does not warrant his taking and disposing of my property. Where death or bankruptcy has taken place, the choice between these two remedies is often very important.

The present essay will be chiefly confined to the action for money had and received, as enforcing an obligation to refund money which ought not to be retained. The Roman system of jurisprudence ranked this as a *Quasi contract*, being an intermediate order between contracts properly so called, which were founded upon actual consent, and wilful wrongs. And without particularising their technical distinctions, I shall, in referring to that law, in general consider the term *Solutio indebiti*, as comprising the general distinctions arising from a liability to refund.

This obligation was enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it. The mere legal liability to the original payment was not the question in consideration, but the injustice of permitting the money or other property, under all the circumstances, to be retained. The introduction of the action for money had and received into the English courts, is not novel, and several cases had occurred previous to the appointment of Lord MANSFIELD, in which it had been properly applied, so that it was familiar in point of practice. But it was reserved to that eminent judge to trace the nature and principles of the action, with a most instructive perspicuity, and to direct the general application of it in its proper channel.

In some instances the particular decisions may be reasonably questioned, but the utility resulting from his general discussions must be universally allowed. In the case of *Moses v. Macferlan*, 2 Burr. 1005, which gave him the first opportunity of expressing his opinion, upon

this ground of action, he very compendiously stated the nature and principles of it, coinciding in effect with the institutes of the civil law. The following extract from his opinion, will furnish a proper introduction to a more minute examination of the subject: "This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money, which *ex æquo et bono*, the defendant ought to refund, it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got by imposition (express or implied), or extortion or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money."

The maxim of the civil law, that it is naturally just that one man shall not be enriched to the detriment of another, *Hoc natura æquum est, neminem cum alterius detrimento fieri locupletiores*, is particularly applied to the claim which we are at present examining.

The Commentary of Vinnius upon the title in the institutes, *De solutione indebiti*, contains a very instructive view of the subject. His general exposition of it, which agrees in substance with the preceding observations of Lord MANSFIELD, is as follows: "In order to induce an obligation in favour of the person paying, and a right to reclaim what has been paid, two things are required. That what is paid should not be due; that it should be paid through error. In respect of the first; there is no repetition of what is really due: and nobody can suppose that there is a right of repetition if what was paid was due both in point of law and of natural justice. But supposing it only due according to one of these: if it is only by strictness of law, without any obligation in point of equity, and could be repelled by a perpetual exception, the right of repetition is allowed: as such a sum cannot be said to be due except in name. But what is due according to natural justice is considered as being really due: and although the payment of it could not be enforced, yet if it is actually paid, though by a person who supposes himself to be liable in point of law, it cannot be reclaimed. If a debtor has a perpetual exception, but which is founded upon some reason that does not remove his natural obligation, and not being apprized of it, pays the debt, he has no claim to repetition.

Such is the exception of a judgment in his favour, as the sentence of the judge cannot destroy the obligation founded on the consent of the party, and therefore it was decided, that a person really indebted, but liberated by a judgment in his favour, could not insist upon a repetition. Also, if a person under the power of his father, borrowed money, from the payment of which he was protected by the *Senatus consultum Macedonianum*, and after he became his own master (*pater familias*) paid the money, he was bound, as there was a natural obligation subsisting.¹

JOHN AUSTIN: LECTURES ON JURISPRUDENCE (1832).

(3d ed., p. 944.)

STRICTLY, Quasi-Contracts are acts done by one man to his own inconvenience for the advantage of another, but without the authority of the other, and, consequently, without any promise on the part of the other to indemnify him or reward him for his trouble.

Instances: *Negotiorum gestio*, in the Roman law; Salvage, in the English.

An obligation arises, such as would have arisen had the one party contracted to do the act, and the other to indemnify or reward. Hence the incident is called a "quasi-contract;" i.e., an incident, in consequence of which one person is obliged to another, *as if* a contract had been made between them.

The basis is, to incite to certain useful actions. If the principle were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward. Whether it shall be admitted, or not, depends upon the nature of the

¹Inasmuch as this Essay is an early, if not the first, conscious and systematic treatment in English of the Law of Quasi-Contract, Evans' classification may be of interest.

Contents.—Introduction—Chap. I. Of Money paid by Mistake: Sec. I. Mistakes of Law; Sec. II. Mistakes of Fact—Chap. II. Money paid on a consideration which has failed: Sec. I. Failure by Misconduct of the Defendant; Sec. II. Failure by change of Intention in the Plaintiff; Sec. III. A Failure from Accidental Circumstances—Chap. III. Money paid through imposition or extortion—Chap. IV. Money paid on Illegal Contracts: Sec. I. Contracts attended with Criminality, Turpitude, or Oppression; Sec. II. Contracts which are Void, but not Criminal (Part I. Void Insurances, Part II. Wagers, Part III. Annuities)—Chap. V. Cases in which the Action is not maintainable: Sec. I. Miscellaneous Cases; Sec. II. Compromise—Chap. VI. The Effects of Judicial Proceedings—Chap. VII. By what Persons the Action may be maintained—Chap. VIII. Against what Persons the Action may be maintained—Chap. IX. The Damages.—Ed.

act—i.e., its general nature; since, without a general rule, the inducement would not operate, nor would the limitation to the principle be understood. Acts which come not within the rule, however useful in the particular instance, must be left to benevolence incited by the other sanctions.

But quasi-contract seems to have a larger import,—denoting any incident by which one party obtains an advantage he ought not to retain, because the retention would damage another; or by reason of which he ought to indemnify the other. The prominent idea in quasi-contract seems to be an undue advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify.

SIR HENRY SUMNER MAINE: ANCIENT LAW (1861).

(4th ed., pp. 343-344.)

THE part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. "Quasi," so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts, but this is an error; for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the Convention, the most essential ingredient of Contract, is wanting. This word "quasi," prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one

department of law may be transferred to the other, and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed.

JAMES BARR AMES: THE HISTORY OF ASSUMPSIT (1888).

(2 Harvard Law Review, pp. 63-64.)

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts." (In Finch, Law, 150, they are called "as it were" contracts.) Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another. [(4) In Roman law, there were certain cases of *negotiorum gestio* where defendant was liable, although there was no enrichment. There is nothing corresponding in English law, or, rather, there are only a few cases.¹]

¹From a manuscript note by Mr. Ames.

The above statement of the origin and sources of Quasi-Contracts (adopted by Judge KEENER in his Treatise on Quasi-Contracts) was judicially considered, approved and adopted in *Ingram v. U. S.* (1897) 32 Court of Claims, 147, 167-168, per NOTT, C. J.

And see an article on the Law of Quasi-Contracts by the late Professor Wald in 14 Law Quarterly Review, 253-259.

The provisions of the modern Roman Law on the subject of Quasi-Contracts will be found in the following references: 2 Windscheid's Pandektenrecht, §§ 421 *et seq.*; French Code Civil (Dalloz) Arts. 1370-1381; Baudry-Lacantinerie & Barde's *Traité de Droit Civil: Des Obligations* (3d part) pp. 1037-1077; Italian Civil Code (French translation by Prudhomme) Arts. 1140-1150 (annotated with references to various European and Spanish-American codes and laws); Spanish Civil Code (Falcon) Arts. 1887-1910 (annotated with references to European and American codes and laws); Civil Code of Louisiana, Arts. 2271-2293; 2 Hennen's Louisiana Digest, 1282-1286; Louque's Digest, 603-605; Taylor's Digest, 698-699; Breau's Digest, 856-857.—Ep.

CHAPTER II.
EXTENT OF THE OBLIGATION.

SECTION I.
OBLIGATION ARISES FROM A RECORD.

DUPLEIX *v.* DE ROVEN.
HIGH COURT OF CHANCERY, 1705.
[2 *Vernon*, 540.]

PLAINTIFF and defendants intestate were merchants at *Lyons* in *France*. The plaintiff recovered a judgment, or sentence there, against the intestate; and afterwards the intestate failing, compounded for a lesser sum, for which in 1676, he gave a note, as for so much due upon an account stated; but before any payment or satisfaction, the intestate fled out of *France*, and at the Indies acquired a considerable estate; and about *four* years before the bill exhibited died intestate. The defendant took administration to him, and lately had considerable effects come to his hands. The bill was for a discovery of assets, and satisfaction of the plaintiff's debt.

The defendant pleaded the statute of limitations.

Per Lord Keeper [Cowper]. Although the plaintiff obtained a judgment or sentence in *France*, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit*, or an *insimul computasset*, &c., so that the statute of limitations is pleadable in this case; and although both parties were foreigners, and resided beyond sea, that will not help the plaintiff. The statute provides where the party plaintiff, he who carries the action about with him, goes beyond sea: his right shall be saved (Statute 21 *Jac.* 1, cap. 16, sect. 7); but when the debtor or party defendant goes beyond sea; there is no saving in that case (sed vide 4 *Anne*, cap. 16, sec. 19, by which the right is saved in that case also, et vide as to the general force of judgments in foreign courts, *Newland v. Horseman*, ante, 1 vol. p. 21, and cases cited in note there). It is plausible and reasonable, that the statute of limitations should not take place, nor the *six* years be running, until the parties come within the cognizance of the laws of *England*; but that must be left to the

legislature. The plea allowed, and again on a rehearing, Reg. Lib. 1705, A. fol. 222).¹

WILLIAMS v. JONES.

COURT OF EXCHEQUER, 1845.

[13 *Meeson and Welsby*, 628.]

DEBT on a judgment of the county court of Carnarvonshire. To the declaration there was interposed a special demurrer, assigning for causes (*inter alia*) that in law no action lies upon the judgment of an inferior court not of record; and that it is not stated in the declaration that the defendant was a resident within the said county of Carnarvon, or within the jurisdiction of the said court, or that he had been duly summoned to the said court. Joinder in demurrer.²

PARKE, B.—The principle on which this action is founded is, that, where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not. That the present objection has not been taken in similar cases heretofore may not be a very strong argument, and yet is entitled to considerable weight, when it is considered how obvious the objection is. These observations apply to the nature of the remedy generally, and not to the mode of enforcing it.

ALDERSON, B.—I am of the same opinion. The principle, that an

¹Notwithstanding Chief Justice HOLT's protest, in *York v. Toun*, 5 Mod. 444, against the extension of *indebitatus assumpsit*, "The new action," says Mr. Ames, "continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705, *Dupleix v. De Roven*, 2 Vern. 540, and the 'metaphysical notion' of a promise (*Starke v. Cheeseman*, 1 Ld. Ray, 538) implied in law become fixed in our law." The History of Assumpsit, 2 Harv. Law Rev. 66.

"A judgment of a court of a sister state is entitled under the Constitution and Laws of the United States to all the dignity of a record in respect to matters of pleading and evidence. Consequently an action of assumpsit will not lie upon such a judgment. The declaration must be in debt, counting upon the judgments as a record. A certain early case advanced the opinion that the action might be either debt or assumpsit, but could not be case. But it must be perfectly apparent that the only proper form is debt." Black on Judgments, § 873, and cases cited.—Ed.

²The statement of the case is shortened. Lord Chief Baron POLLOCK's opinion is omitted, and only that part of the opinions of Barons PARKE and ALDERSON is given which relates to the nature of the obligation.—Ed.

action of debt may be brought upon a judgment of an inferior court, applies equally to courts of record and not of record, and cannot be limited by the consideration, that, in the case of a judgment of a court not of record, you are thereby giving a more extensive remedy against the defendant, because that would apply to both descriptions of judgments. There is no foundation for a distinction between the cases. The true principle is, that where a court of competent jurisdiction adjudges a sum of money to be paid, an obligation to pay it is created thereby, and an action of debt may therefore be brought upon such judgment. This is the principle on which actions on foreign judgments are supported.

GRANT v. EASTON.

COURT OF APPEAL, 1883.

[*Law Reports, 13 Queen's Bench Division, 302.*]

THE plaintiff, who resided in Egypt, had obtained against the defendant a judgment dated the 2nd of July, 1883, in Her Britannic Majesty's Vice-Consular Court at Cairo. The defendant resided in England. The plaintiff then commenced in the High Court of Justice an action founded upon the judgment obtained in the Vice-Consular Court at Cairo, and an order was made at chambers by a master, empowering the plaintiff to enter judgment summarily. This order was affirmed on appeal by the judge sitting at chambers, and afterwards by the Queen's Bench Division. The defendant then appealed to this Court.

BRETT, M.R. [After citing *Hodsoll v. Baxter*, E. B. & E. 884.]—But if no authority had existed, I should have come to the same conclusion. An action on a judgment has been treated as an action of debt. It has been suggested, however, that a difference exists between English and foreign judgments, but in the present case the question is, whether the defendant can shew any defence to the claim made against him. Upon principle what difference can there be between an English and a foreign judgment in this respect? An action upon a foreign judgment may be treated as an action in either debt or assumption: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment.¹

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

¹Perhaps the clearest statement of the nature of a judgment to be found in the English reports is in the case of *Bidleson v. Whytel* (1764) 3 Burr. 1545, 1548 (apparently overruling *Biddolph v. Semple* (1669) 1 Lev. 260), in which Lord MANSFIELD, speaking for all the judges, said "that a judg-

PEERCE v. KITZMILLER.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1882.

[19 *West Virginia Reports*, 564.]

ONE Kitzmiller brought an action of trespass against one Peerce for damages sustained by the fact that Peerce had, during the civil war, taken and carried away certain cattle belonging to Kitzmiller, and in an action Kitzmiller recovered judgment in 1869 for \$410.

In 1873, Peerce presented a petition to the court, in which judgment was had, setting forth that petitioner is a citizen of the state of West Virginia; that he aided and participated in the late war between the Government of the United States and a part of the people thereof, and that the said judgment was recovered against the petitioner for an act done by him according to the usages of civilized warfare in the prosecution of the said war. The prayer of the petition was that the judgment rendered might be set aside and a new trial awarded. The prayer was based upon section 35, article VIII of the Constitution of West Virginia, adopted Aug. 22, 1872, which reads as follows: "No citizen of this state who aided or participated in the late war between the Government of the United States and a part of the people thereof on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered or otherwise because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto."

The court found that the cause of action was based upon a tort committed according to the usages of civilized warfare during the civil war; set aside the judgment and awarded a new trial. To this order of the court Kitzmiller duly excepted, and a writ of error was allowed.¹

ment is no contract, nor can be considered in the light of a contract: for *judicium redditur in invitum*." And see the admirable case of *Jordan v. Robinson* (1838) 15 Me. 167.

"According to the rule now prevailing in England and the United States, an action upon a foreign judgment may be brought either in debt or assumpsit, the liability of the defendant arising upon the implied contract to pay the amount of the foreign judgment. In Canada, however, the courts hold that assumpsit only, and not debt, is the proper form for an action on a judgment recovered abroad." Black on Judgments, § 848, and cases cited.

As to the nature of judgments, domestic as well as foreign, and the respective means of enforcing them, see the elaborate opinion of Mr. Justice GRAY in *Hilton v. Guyot* (1894) 159 U. S. 113.—Ed.

¹A short statement of facts of the case is substituted and only a part of the opinion of the learned judge is printed.—Ed.

JOHNSON, President, announced the opinion of the Court: So the only enquiry we have to make as to the validity of the constitutional provision we are considering is: *Does it violate the obligation of a contract, and if not, does it deprive any person of property without due process of law?* Is a judgment founded upon a tort a contract?

In *Fletcher v. Peck*, 6 Cranch, 137 *supra*, MARSHALL, Chief Justice, defines a contract to be a "*compact between two or more parties.*" In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, Mr. Justice McLEAN in his opinion, 572, said: "What was the evil against which the Constitution intended to provide by declaring that no State shall pass any law impairing the obligation of contracts? What is a contract and what is the obligation of a contract? A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement sanctioned by moral and legal principles. The evil, which the inhibition on the States was intended to prevent, is found in the history of our revolution. By repeated acts of legislation in different States during that eventful period the obligation of contracts was impaired. The time and mode of payment were altered by law; and so far was this interference of legislation carried, that confidence between man and man was well nigh destroyed."

In *Baltimore & Susquehanna R. R. Co. v. Nesbitt et al.*, 10 How. at page 398, Mr. Justice DANIEL, in delivering the opinion of the Court, said: "It must be certainly shown, that there was a perfect investment of property in the plaintiff in error by contract with the legislature and a subsequent arbitrary divestiture of that property by the latter body, in order to constitute their proceeding an act impairing the obligation of a contract."

In *Sturges v. Crowningshield*, 4 Wheat. Chief Justice MARSHALL, at page 197, in speaking of the meaning of the Constitution of the United States, said: "It would seem difficult to substitute words, which are more intelligible or less liable to misconstruction than those, which are to be explained. A contract is an agreement, in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking; and this is of course the obligation of his contract."

In *Todd v. Crumb*, 5 McLean, 172, it was held, that a judgment is not an agreement, contract or promise in writing, nor is it in a legal sense a specialty.

In *Garrison v. City of New York*, 21 Wall. at page 203, Mr. Justice FIELD, in delivering the opinion of the Court, said: "It may be doubted, whether a judgment not founded upon an agreement express or implied is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and by fiction of law where there is a legal obligation to pay, a promise to pay is implied. It is upon this principle, says Chitty, that an action in form *ex contractu* will lie on a judgment of a court of record. But

it is not perceived, how this fiction can convert the result of a proceeding not founded upon an agreement express or implied but upon a transaction wanting the assent of the parties into a contract within the meaning of the clause of the Federal Constitution, which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any State interference. If no assent be given to a transaction, no faith is pledged in respect to it; and there would seem in such case to be no room for the operation of the prohibition. In the proceeding to condemn the property of the plaintiff for a public street there was nothing in the nature of a contract between him and the city. The State in virtue of her right of eminent domain had authorized the city to take his property for a public purpose upon making to him a just compensation. All that the Constitution or justice required, was, that a just compensation should be made to him, and his property would then be taken, whether or not he assented to the measure."

In delivering the opinion of the court in *Blount v. Windley*, 5 Otto, at page 176, Mr. Justice Miller said: "The proposition of plaintiff in error is, that when he recovered the judgment against the defendant, he had a right to exact and receive in payment of that judgment gold or silver coin or the legal-tender treasury-notes of the United States, and that defendant had no right to pay him anything else; that the judgment was a contract, and the obligation of it is impaired by the statute, which authorizes payment in something else. It is undoubtedly true in some sense and for some purposes, that a judgment has been treated and considered as a contract; and we are not disposed to deny, that the judgment in this case is evidence of a contract, but the judgment is only a contract, because it is evidence of a debt or obligation on the part of defendant due to plaintiff. The judgment itself presupposes and is founded on some antecedent obligation or contract and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged; and in deciding how far it may be affected by legislation we must look mainly to the original contract."

Mr. Justice SWAYNE, in delivering the opinion of the court in *Edwards v. Kearzey*, 6 Otto, 599, said: "A contract is the agreement of minds upon a sufficient consideration that something shall be done, or shall not be done."

It is clear, that a judgment founded upon a tort can in no case be regarded as a contract. There is no agreement of the parties; and there is no consideration. It is founded upon no agreement of the parties, and there could have been no consideration moving the parties in such a case. Instead of harmony there was discord; instead of agreement there was disagreement; and it would be absurd to say, that under such circumstances there could be a contract between

the parties. But it is insisted by counsel for plaintiff in error that "in *Gunn v. Barry*, 15 Wall. 610, the Supreme Court of the United States expressly affirmed, that a convention of the citizens of a State could no more set aside a judgment or destroy a vested right than a legislature."

It was taken for granted in that case, and not controverted by any one, that the judgment was *founded upon a contract*, the obligation of which had been impaired. Mr. Justice SWAYNE, at page 623, says: "The legal remedies for the enforcement of a contract, which belong to it at the time and place, where it is made, are a part of its obligation." This case decides, what has been conceded in this opinion, that the people of a State in adopting their Constitution cannot impair the obligation of a contract any more than a legislature can. If the judgment had been founded upon a tort, it would have been shown in the case: but it seems to have been conceded, that it was founded on contract. It was not intended by the Court to give any different definition to "contract," than had been so often by the same Court applied to the term. That case was not intended to and does not decide, that a judgment founded on tort is in any sense whatever a contract. We conclude, that the constitutional provision, which we are considering, does not impair the obligation of a contract.

Judges HAYMOND and GREEN concurred.

Judgment reversed. Petition dismissed.¹

'In accordance with the opinion of the court in this and many other cases, it would seem that the judgment merely ascertains and establishes in a judicial proceeding the existence of an obligation already existing: that while the right is merged in the judgment the cause of action is not and remains unaffected. As Chief Justice SHAW well said: "Although a judgment, to some purposes, is considered as a merger of the former, and as constituting a new cause of action, yet when the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was. *Wyman v. Mitchell*, 1 Cowen, 316. Any other decision would carry the technical doctrine of merger to an inconvenient extent and cause it to work injustice." *Betts v. Bagley* (1832) 12 Pick. 572, 580.

If, therefore, the cause of action do not arise upon a contract, or if it arise upon a statute imposing a mere duty or obligation, then the judgment rendered is not a contract within the clause impairing the obligation of contract (Const. of U. S., Art. I, § 10). In accordance with this view are the following cases: *Louisiana v. Mayor* (1883) 109 U. S. 285; *Nelson v. St. Martin's Parish* (1883) 111 U. S. 716, 720; *Chase v. Curtis* (1884) 113 U. S. 452, 464; *Wisconsin v. Pelican Ins. Co.* (1887) 127 U. S. 265, 293; *Freeland v. Williams* (1888) 131 U. S. 405, 413; *Morley v. Lake Shore Ry. Co.* (1892) 146 U. S. 162, 168-170; *Smith v. Broderick* (1895) 107 Cal. 644, 651; *Wells v. Edmison* (1885) 4 Dak. 46, 50. ("A judgment is essentially different from a contract in its nature and element and is deemed in law an 'obligation of record.'") *O'Brien v. Young* (1884) 95 N. Y. 428; *Remington Paper Co. v. O'Dougherty* (1884) 96 N. Y. 666 (affirming 32 Hun, 255; but see *The Gutta-Percha Shoe*

SECTION II.

OBLIGATION ARISES FROM A DUTY.

1. CUSTOMARY.

WHITE'S CASE.

HILARY. COMMON PLEAS, 1158.

[*Dyer*, 158 *b.* p. 32.]

ONE *White* brought trespass on the case against an innkeeper of *Uxbridge* alleging the custom of the realm to keep safely the goods of his guests, &c. and that his goods were in the inn, and taken away, &c. And the defendant pleaded that they were not taken away by his default, or the default of his servants. And upon evidence

Co. v. Mayor (1888) 108 N. Y. 276; *Sherman v. Langham* (1897) 92 Tex. 13, 19. See, however, *Bettman v. Cowley* (1898) 19 Wash. 207, to the effect that a law limiting the duration of the liens of existing judgments is an impairment of contract.

If the judgment is based upon a contract, then the judgment is a contract, at least within the federal inhibition (*Nelson v. St. Martin's Parish, supra*), and although the judgment itself is conclusive as to the rights of the parties to it, yet the court may inquire whether the judgment is founded on a contract or not. *Stewart v. Jefferson Police Jury* (1885) 116 U. S. 135; *State v. New Orleans* (1885) 37 La. Ann. 13; *Wisconsin v. Pelican Ins. Co.* (1887) 127 U. S. 265, 292-293; *Huntington v. Attrill* (1892) 146 U. S. 657.

From the above authorities it would seem that the Common is in accord with the Civil Law as to the effect or influence of a judgment upon a cause of action. "The doctrine laid down by the Supreme Court of Louisiana, in *Gustine v. The Union Bank* [12 Rob. La. 412, 418] in 1845, may be taken to represent the civil-law conception of a judgment. The court then said that a judgment does not create, add to, nor detract from, the indebtedness of a party; it only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment. We recur then to the obligation on which the judgment is based. That obligation may have arisen from a contract, or from a quasi-contract, or from an offence, or from a quasi-offence, or, finally, from the mere operation of law; and such obligation is not added to, nor detracted from, by the decree of the court. It is declared to exist; it is interpreted; it is applied: it is put in the way of enforcement by the judicial power of the state." William Wirt Howe, *Studies in the Civil Law*, 189-190.

For instances of recovery upon a recognizance, see *State v. McGuire* (1889) 42 Minn. 27, 28; *Bodine v. Commonwealth* (1854) 24 Pa. St. 69, 71. For the history, nature and effect of a recognizance, see *People v. Kane* (1847) 4 Den. 530.—ED.

it was agreed, *per Curiam*, that if a guest come to an innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c. and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged, because he refused the guest. And if the cause of the refusal be false, the guest may have his action on the case for his refusal. And the evidence above well stands with the issue before joined. *Quod nota.*¹

CITY OF LONDON v. GOREE.

TRINITY. KING'S BENCH, 1677.

[3 *Keble*, 677.²]

SPECIAL Verdict on *non Assumpsit* find there was no actual promise, but find prescription for the duty on Waiaage. *Symson* for the Plaintiff, that in *Carpenters* Case here, and for the duty of Walter-Bailage *Indebitatus* lieth: And by RAINSFORD Chief Justice in the *Exchequer* on argument it was adjudged that *Indebitatus* lay upon acceptance of a Bill of Exchange, and on a Policy of assurance *Indebitatus* lieth, and *Hob.* on Sheriffs Receipt of Money, and against the Executor on *Devastavit*, and all the actions for Wharfage, Cranage, and duties of the City are thus; and in *Bradshaw* and *Proctors* Case

¹As to the liability of an innkeeper see *Cayle's* case (1584) 8 Co. 32a, in which early authorities are collected; *Morgan v. Ravey* (1861) 6 H. & N. 265, 275 (Wharton's edition) and the elaborate note at end of the case in which the more modern cases are collated.

In *Morgan v. Ravey*, *supra*, the action was by a guest against the executors of an innkeeper, whose property had been stolen during the night, and it was held that the action lay against the executors: "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier. If so, the objection that such an action would not lie against executors because it is for a tort does not arise." (per POLLOCK, C. B.)

For a case of negligence resulting in an injury to the person, see *Stanley v. Bircher's* executor (1883) 78 Mo. 245, holding that action does not survive against the executors.—Ed.

²See also same case 1 *Ventris*, 298.

The case is reported in *Levinz*, 174, as follows:

"Assumpsit for money due by custom for seavage. Upon *non Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom without express promise, was the question. Resolved it does."—Ed.

Indebitatus for Fees, as Judge of the Sheriffs Court, and this Term in *Woodward and Ashtons Case*, *Indebitatus* by one Clerk against the other for Fees; and the reason of *Slades Case*¹ was not on the Wager of the Law, but because he was not indebted; and by the Act of Parliament confirming the custom, this is a duty that ariseth *ex quasi Contractu*, and not *ex delicto*, though it were originally but a charge upon the Subject, for it being agreed that debt lieth, a *Fortiori* an *Indebitatus*. Judgment for the Plaintiff.²

JACKSON v. ROGERS.

MICHAELMAS. KING'S BENCH, 1683.

[2 Shower, 327.]

ACTION sur le Case, for that whereas the Defendant is a Common Carrier from London to Lymington & abinde retorsum, and setting it forth as the Custom of *England*, that he is bound to carry Goods, and that the Plaintiff brought him such a Pack, he refused to carry them, though offered his Hire; and held by the Lord Jefferyes, that the Action is maintainable, as well as it is against an Inn-keeper for refusing Guest, or a Smith on the Road who refuses to shoe my Horse, being tendred Satisfaction for the same. *Note*, That it was alledged and proved that he had Convenience to carry the same; and the Plaintiff had a Verdict.³

¹For *Slades' case* and its importance in the history of assumpsit, see Mr. Ames' History of Assumpsit, 2 Harv. Law Rev. 55, 56.—Ed.

²"The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be the city of London v. Goree, decided seventy years later than *Slades' case*." *Ib.* 65.—Ed.

³Anonymous (Mich. Term. 2 Will. & Mary) 12 Mod. 3; "An action lies against a common carrier for refusing to carry money, if he do not assign a particular reason for it."

"If a man takes upon himself a publick employment, he is bound to serve the publick as far as his employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse. Keilw. 50. against an inn-keeper refusing a guest, when he has room. Dier, 158, pl. 32, against a carrier refusing to carry goods when he has convenience, his waggon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the post-master, for refusing to receive a letter, etc." *Lane v. Cotton* (1701) 1 Ld. Ray, 646, 654. See also the early cases of *Upshare v. Aidee* (1697) 1 Comyns, 25; *Middleton v. Fowler* (1698) 1 Salk. 282.

In the case of a common carrier assumpsit lies, *Orange Bank v. Brown* (1829) 3 Wend. 158, 161; *Patten v. Magrath* (1839) 1 Rice 162; *McCall v. Forsyth* (1842) 4 W. & S. 179, although case is the most usual form of

2. OFFICIAL.

SPEAKE v. RICHARDS.

TRINITY. COMMON PLEAS, 1618.

[Hobart, 206.]

HUGH SPEAKE brought an action of debt, of five hundred and twenty-three pounds and seventeen shillings, against Edward Richards, late high sheriff of the county of Southampton, and declared that one Paramour and others were bound by recognizance in chancery in two thousand pounds to the plaintiff, and that after other process and judgment, 10 *Julii* 14 Jac., the plaintiff sued a *levari fac.* to the defendant, returnable 15 Mich., which was delivered Aug. 1, whereupon the defendant levied the sum, and at the day returned that he had levied the same sum, quos paratos habeo, and yet did not deliver it in court; per quod, &c. The defendant, *quoad* 30s. pleaded *nihil debet*, whereupon the plaintiff took issue; and as to the rest he pleads, that after the issuing of the writ, and before the return, *scil.* Aug. 31, he did pay unto the plaintiff the same sum, whereupon the plaintiff, by his acquittance, the same day, reciting that he had received it, did acquit him of it; whereupon the plaintiff demurred in law.

The first question¹ in this case was, whether the action of debt would lie, because there was no contract between the plaintiff and the sheriff. But that was resolved by the court that it would lie; for though there were no actual contract yet there was a kind of contract in law, so it is *ex quasi contractu*. And therefore upon damages recovered in an action of trespass, the plaintiff shall have an action of debt; and by the same reason when the money is levied by the sheriff, so as the action action, and see the somewhat anomalous case of *Dickinson v. Winchester* (1849) 4 Cush. 114, per SHAW, C. J.

The following passage gives the Roman Law, quasi-contractual in its origin and nature, on this branch of the subject:

"A shipowner, innkeeper, or stablekeeper, who takes charge of property belonging to a traveller, is answerable for such property in like manner as though he had concluded an express contract to that effect. This liability was first introduced by the praetor. If the property in question is lost or injured, the traveller can sue for full damages by the *actio de recepto*, unless, indeed, the defendant (the shipowner, &c.) can prove that the loss was caused by the traveller's own negligence or by an unavoidable accident (*vis major*). L. 1 pr. D. *nautæ caup.* (4, 9): *Ait praetor: Nautæ, caupones, stabularii, quod enjusque saluum fore receperint, nisi restituent, in eos iudicium dabo.*" Ledlie's Sohn, 427. See also, 2 Windseheid's *Pandektenrecht*, § 384.—Ed.

¹Only so much of the case is given as relates to this question.—Ed.

ceased against the defendant, the same action is *ipso facto* by law transferred to the sheriff, having both the judgment to make it a debt, as before, and the levy to make him answerable; like unto the case of 1 H. 7. of a tally delivered to the customer, as soon as money comes into his hands he is made a debtor. *Quære*, if an action of debt may not be had against the executor as the principal debtor, declaring of a *devastavit* by him.¹ Debt lies by corporations for the penalties forfeited upon their laws; so for amerciaments in the court barons; so 11 H. 7. 14. for three pounds forfeiture, upon a custom for pound breach; and 34 H. 6. 36. & 9 E. 4. 50. It is holden that upon such levies by the sheriff appearing upon record, the court may award a *distringas*, or the party may have a *feri fac.* or *elegit* against the sheriff, to levy as much as his own: see Mich. 8 H. 8. Reports, Crooke, 187. O. N. in the exchequer makes the sheriff debtor to the king, and the debtor himself debtor to the sheriff; and though an action of account will lie properly in this case, yet the same case will many times bear both actions, though the money be received *per auter mains*, or the like.² But then the action of account is necessary, when the first receipt *ab initio* was directed to a merchandizing, which makes uncertainty of the neat remain till account finished; or where a man is charged as bailiff of a manor, or the like, whereupon the certainty of his receipt appears not till account.³ Yet even in the case of merchandizing an action of debt will lie for the sum received before the merchandize, yea and after the merchandize, for so much as he hath not so employed; and therefore if I deliver an hundred pounds to one, to buy cattle, and he bestow fifty pounds of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed, and charges, &c.; but for the rest I shall recover.

¹In *Wheatley v. Lane* (1668-9) 1 Wms. Saunders, 216 and n., the *Quære* was resolved in the affirmative.

In *Dingley v. Halse* (1679) 2 Show. 55 it was said: "Debt against an executor; no assets pleaded; assets found; and, upon a *devastavit* returned, there is judgment against him *de bonis propriis*: the plaintiff brings a new action of debt upon that judgment, reciting all that matter, and laid it in the *debet* and *detinet*."

"Resolved, that the defendant is bound to put in *special bail*, though an executor; because there might have issued a *feri facias de bonis propriis*. And though this be a new way to recite, etc., yet the court knew no inconvenience in it, it being now become the executor's own debt: the sole reason why executors are not bound to put in special bail, is because *non constat* whether they have *assets* or no; but the jury having found assets, they ought to put in special bail to an action of debt on such judgments. Ruled by the whole court."—Ed.

²Debt was not concurrent formerly with account, but afterwards became so when the amount was liquidated. See Mr. Ames in 2 Harv. Law Rev. 66.—Ed.

³For a description of this obsolete action, see C. C. Langdell: A Brief Survey of Equity Jurisdiction, 74 *et seq.*—Ed.

KING v. MOORE.

SUPREME COURT OF ALABAMA, 1844.

[6 *Alabama*, 160.¹]

KING, the present plaintiff in error, was summoned as a garnishee, at the suit of Moore against Lewis, and answered, that he had in his hands 113 dollars belonging to the defendant, the remainder of the proceeds of a sale made by him as constable, after satisfying the *fi. fas.* directed to him. In a supplemental answer, he asserts the money had been demanded from him by the defendant in execution, and that he had received notice of a rule against him to pay over the money.

The court rendered judgment against him for the amount of the judgment previously rendered against the defendant in attachment, which was less than the sum in his hands. He now assigns the judgment as error.²

GOLDTHWAITE, J.—In *Zurcher v. Magee*, 2 Ala. Rep. 253, we held, that money collected by a sheriff was not subject to an attachment against the plaintiff in the execution; but the principle of that case is supposed not to govern this. One reason why money, in this condition, cannot be reached, is, that it is in the custody of the law; and it would be greatly inconvenient to allow the final process of courts to be affected by other proceedings not under control of the parties to the execution. This reason does not apply to the excess which oftentimes must, necessarily, remain with the executive officer, after satisfying the plaintiff's demands. The officer is the agent appointed by the law, to sell the property of the defendant; and if, in the discharge of this duty, a sum of money remains with him, it is the money of the defendant, in no way distinguishable from any other case of agency. Nor does the circumstance, that a statute authorizes the defendant, when his money is improperly detained from him, to proceed summarily against the officer, bring the case within the principle which exempts money, *in custodia legis*, from attachment, because no process is meddled with; nor can any injurious consequences flow from considering it in the same view as any other money in the hands of an agent.

Let the judgment be affirmed.

¹Reported likewise in 41 Am. Dec. 44, with note.—Ed.

²See Freeman on Executions (3d. ed.) § 130 and cases cited.—Ed.

3. STATUTORY.

THE FRANCISCO GARGUILO.

DISTRICT COURT OF THE UNITED STATES, 1882.

[14 *Federal Reporter*, 495.]

BENEDICT, D.J.—This case comes before the court upon exceptions to the libel. The facts averred in the libel are in substance these: The libelant, John E. Johnson, being a regular licensed pilot, was employed to pilot the bark Francisco Garguilo from sea to the port of New York, and in fact did bring that vessel in from sea. When the vessel was about to leave the port the next time, the master of the vessel arranged with the libelant to meet him at a certain time and place in the city of New York, whence, according to the arrangement, the pilot and the master were to go together on board the bark, and the bark was then to be taken to sea by the libelant. In pursuance of this arrangement, the libelant presented himself at the time and place appointed. The master did not then appear, but went on board his vessel and to sea without a pilot.

The statute of the state of New York provides that “any pilot bringing in a vessel from sea shall, by himself or one of his boat’s company, be entitled to pilot her to sea when she next leaves the port.” By virtue of this statute the libelant, upon the facts stated, became entitled to take this vessel to sea on the voyage described in the libel. An obligation to employ and pay the libelant for that service was created by the statute. Upon due tender of the service by the libelant and refusal by the master to accept the same, a right of action for damages resulting accrued to the libelant. This right of action arising out of the non-performance of a *quasi* contract of pilotage is maritime in character, and may be enforced in admiralty. The case is similar, in these respects, to cases decided by the supreme court of the United States. *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNiel*, 13 Wall. 242.

In order to make a proper tender of his services as outward pilot for the vessel, it was sufficient for the pilot to present himself at the time and place appointed by the master to meet the pilot and take him on board. Under the circumstances stated in the libel it was not necessary for the pilot to present himself on board the vessel in order to make the tender of service complete. Nor is the rendition of some service by the pilot on board of the vessel necessary to charge the vessel with liability for the damages resulting from the non-performance of the obligation created by the statute.

There must be a decree for the libelant upon the exceptions, with leave to claimant to answer on payment of costs.¹

SECTION III.

OBLIGATION ARISES FROM AN UNJUST ENRICHMENT.

ANONYMOUS.

IN THE EXCHEQUER CHAMBER.

JENKINS' CENTURY CASES, CASE V.

THE Wife of A receives £10 to the use of A and this comes to the Use of her Husband in a convenient or necessary Way; altho' the Husband did not command it, nor consent afterwards, he is liable to this Debt, and the Count shall be of a Receipt by the Hands of the

¹For a case involving the conflict of laws (of coterminous states) relating to pilots, see *The Clymene* (1881) 9 Fed. R. 164 and 12 Fed. R. 346.

Accord with principal case: *Sturgis v. Spofford* (1871) 45 N. Y. 446; *Gillespie v. Zittlosen* (1875) 60 N. Y. 449; *Thompson v. Sprague et al.* (1882) 69 Ga. 409, 417-419. ("The liability is under the implied contract to employ and pay the pilot first offering, and is recoverable as such, and not as a penalty.")

In the Appeal Tax Court *v. Union R. R. Co.* (1878) 50 Md. 274, 295, the court, per ALVEY, J., said: "It seems to be settled by authority, that where rights are acquired under a statute, in the nature of a contract, or where there is a grant of power, a repeal of the statute will not divest the right or interest acquired, or annul acts done under it. In the case of the *Steamship Co. v. Joliffe*, 2 Wall. 450, there was an action brought for half pilot fees, alleged to have accrued by operation of a provision in a statute which had been repealed; and it was held by the Supreme Court that when a right has arisen upon a transaction which has given rise to an implied contract, or a right in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. So here, if the appellees are liable to be taxed as owners of the property, a duty has arisen upon the assessment made to pay the taxes levied, and such duty could be enforced by an action at law, as upon an implied assumpsit (*Mayor, etc., v. Howard*, 6 H. & J. 395), notwithstanding the repeal of the statute."

See 6 Rose's Notes on U. S. Reports, where numerous cases are cited which, it would seem, abundantly sustain the doctrine laid down in *Steamship Co. v. Joliffe* (1864) 2 Wall. 450.

That a statutory duty to pay interest upon a judgment is a quasi-contract, not a pure contract, and so may be repealed or modified without impairing the obligation of contract, see *O'Brien v. Young* (1884) 95 N. Y. 428. The opinion by EARL, J., contains an elaborate discussion of the nature of quasi-contract. See also *Morley v. Lake Shore Ry. Co.* (1892) 146 U. S. 162.—ED.

Husband: such manner of Count will serve in Debt in this Case. The reason is, the Wife's Contract is void; and it ought not to be alledged in the Count, but the Count ought to be as above. *Nemo debet locupletari ex alterius incommodo.*¹

By the Justices of both Benches.

LOCKWOOD v. KELSEA.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1860.

[41 *New Hampshire*, 185.]

ASSUMPSIT, for \$8, money had and received. The cause was tried by the court at the November term, 1859, when the facts were found to be, that the plaintiff, being at the Crawford House, at the White Mountains, a telegraphic despatch was received at Plymouth for him, and carried by stage driver to the Profile House, and from there to

¹The above case shows how deeply rooted the principle of unjust enrichment is in English law. For the detailed and specific application of the maxim—*nemo debet locupletari ex alterius incommodo*—see Bk. II. Sec. III. *post*, more especially the case of *Bright v. Boyd* (1841) 1 Story, 478, *post*, —

Of the principle underlying recovery for unjust enrichment, it would be hard to find a clearer statement than that of the distinguished Scotch judge, Lord INGLIS: "Now, recompense is a remedial obligation well known to the law, but that obligation is founded on the consideration that the party making the demand has been put to some expense or some disadvantage, and by reason of that expense or disadvantage there has been a benefit created to the party from whom he makes the demand of such a kind that it cannot be undone. The best and most familiar example of that is the case of one building on another's land. But in every case there must be, in order to ground the claim, the loss to one party resulting in a benefit to the other." *Stewart v. Steuart* (1878) 6 Court of Session Cases, 145, 149.—ED.

No enumeration is here attempted of cases permitting recovery based on unjust enrichment: illustrations will be found on almost every subsequent page of the text.

Attention is, however, called to the admiralty doctrine of general average, based as it is upon the theory that a sacrifice of one's property "for the benefit of all shall be made good for the proportionate contribution of all" from the property so benefited. In this there is no contract: the obligation to contribute is clearly equitable or quasi-contractual. From the many cases on this subject, one may be cited: *Barnard v. Adams* (1850) 10 How. 270. For further illustration, see Ames' Cases on Admiralty, 294 *et seq.* For the Roman law illustrating the maxim, *jure nature æquum est neminem cum alterius detrimento et injuria fieri locupletiores*, see Ledlie's Sohm, pp. 423-426; 2 Windscheid's Pandektenrecht, §§ 421 *et seq.*; Girard, Manuel de Droit Romain (3d ed.) pp. 605-618.—ED.

the plaintiff by the defendant, in company with another person; that the plaintiff asked the defendant how much he was to pay him for carrying the despatch; that the defendant said he was to have \$24; that the plaintiff said something about that being rather a high price; that the defendant said \$16 of it was for bringing the despatch from the Profile House, and that \$8 was for forwarding it from Plymouth to the Profile House; and that the plaintiff paid the defendant \$24, by giving him two ten dollar gold pieces and a five dollar gold piece, and receiving back \$1.

The court also found that the declaration of the defendant that \$8 was for forwarding the despatch from Plymouth to the Profile House was false, that the defendant knew it to be false, and that the plaintiff did not know that it was false, but that the plaintiff did not pay said \$24, nor any part thereof, in consequence of that false declaration; that the plaintiff did not pay anything, relying upon that declaration, and that he was not induced to pay anything by that declaration.

The court, ruling that the conclusion of law upon the foregoing facts was that the plaintiff could not recover, found that the defendant did not promise in manner and form as the plaintiff had declared against him, subject to the opinion of the whole court.

FOWLER, J. It is difficult to see how the court below, upon the evidence stated, could have found as they did, that the plaintiff did not pay the \$24, or any part thereof, in consequence of the false declaration of the defendant that \$8 of the sum demanded was for forwarding the telegraphic despatch from Plymouth to the Profile House; that he did not pay anything, relying upon that false declaration, and was not induced to pay anything by that false declaration; when they also found that the plaintiff objected to the claim made as too high, before he paid it, and that he was ignorant of the falsity of the declaration. It would seem to be highly improbable, if not morally impossible, upon the facts found to have existed, that the plaintiff should have paid the \$8, otherwise than in some manner through the influence of the false and fraudulent representation of the defendant.

But, notwithstanding the finding of the court below, we think the plaintiff was entitled, on well established general principles, to recover back from the defendant the \$8. This is not an action for fraud and deceit, as it has been substantially discussed in the defendant's argument, wherein it would be essential to the plaintiff's right to recover, that he should have relied upon a false representation, knowingly and intentionally made by the defendant, and calculated to deceive a person of ordinary sagacity, and have suffered damages thereby. If such were the form of action, it is entirely clear, upon principle, as well as authority, that, under the findings of the court below, the plaintiff could not recover. Page v. Parker, 40 N. H. 47. But the present

is an entirely different kind of an action from case for fraud and deceit.

The action for money had and received, in its spirit and objects, has been correctly likened to a bill in equity; and it may in general be maintained whenever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff, which in equity and good conscience he ought to refund to him. It lies only for money, which, *ex aequo et bono*, the defendant ought to refund; as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition, express or implied, or extortion, or oppression, or an undue advantage taken of the plaintiff's situation. In one word, the *gist* of this kind of action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money. One great benefit which arises to suitors from the nature of the action is, that the plaintiff need not state the special circumstances from which he concludes that, *ex aequo et bono*, the money received by the defendant ought to be deemed as equitably and rightfully belonging to him; he may declare, generally, that the money was received to his use, and make out his case at the trial. This is equally beneficial to the defendant. It is the most favorable way in which he can be sued. He can be liable no farther than for the money he has received; and against that he may go into any equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex aequo et bono*, is not entitled to the whole of his demand, or to any part of it. 2 Gr. Ev. sec. 117; Ld. MANSFIELD, in *Moses v. Macferlan*, 2 Burr. 1005; *Dutch v. Warren*, cited by Ld. MANSFIELD, in *Moses v. Macferlan*; *Dale v. Sollet*, 4 Burr. 2133; *Astley v. Reynolds*, 2 Str. 915; *Guidon v. Hooper*, Cowper, 414, and *Feltham v. Terry*, cited on page 419; *Smith v. Smith*, 2 Johns. 240.

An action for money had and received is maintainable whenever the money of one man has, without consideration, got into the pocket of another. *Hudson et al. v. Robinson*, 4 M. & Sel. 475, per Ld. ELLENBOROUGH.

In the case before us, \$8 at least of the plaintiff's money got into the defendant's pocket, without any real consideration, through the positive and intentional fraud and imposition of the defendant, under a claim that he had paid or was to pay it to the stage driver for bringing the despatch from Plymouth to the Profile House. The supposed consideration for the payment of the \$8 wholly failed. The defendant neither brought the despatch from Plymouth to the Profile House, or paid, or was to pay, any one else for bringing it. The \$8 may well be regarded as having been obtained from the plaintiff through imposition, extortion, oppression, or an undue advantage

taken of his situation. It was claimed and received for services never rendered, or as compensation for expenses never incurred. It was not claimed for anything which the defendant had ever done and performed for the plaintiff. Although it passed, under such circumstances, from the pocket of the plaintiff to that of the defendant, the money still belonged in conscience to the plaintiff; the defendant was bound by the ties of natural justice and equity to refund it; and we think the plaintiff entitled to recover it back in this form of action, notwithstanding the findings of the court below. It would be a reproach to the administration of justice were it otherwise.

The finding of the court below, that the defendant did not promise, must therefore be set aside, and a new finding be entered, that he did promise, in manner and form as the plaintiff hath declared against him, and upon that finding a judgment be rendered for the plaintiff for the \$8 claimed, with interest from the date of the writ.¹

Judgment for the plaintiff.

SECTION IV.

OBLIGATION ARISES FROM A NEGOTIORUM GESTIO.

POLICE JURY *v.* HAMPTON.

SUPREME COURT OF LOUISIANA, 1827.

[5 *Martin, N. S.*, 389.]

PORTER, J., delivered the opinion of the court. This is an action to recover the amount of \$321, paid by the parish of New Orleans, for repairs made on a plantation of the defendant.

The general issue is pleaded. There was judgment in the inferior court against the defendant, and he appealed.

It appears in evidence, that on the 10th day of February, 1822, a jury was assembled in pursuance of certain regulations of the parish of New Orleans, on the subject of roads, levees and bridges; who, after deliberation, directed that certain repairs were necessary on the plantation of the defendant.

That on the 12th day of the same month, the syndic gave notice to the appellant that if the work was not done in conformity with the directions of the jury, it would be executed at his expense, in pursuance of the 16th article of the police regulations of the parish of New Orleans.

¹For an admirable discussion of the equitable nature of the action of money had and received, and the statute of limitations applicable thereto, see *Roberts v. Ely* (1889) 113 N. Y. 128; *Chapman v. Forbes* (1890) 123 N. Y. 532.

See also, *Mertens v. Roche* (1899) 57 N. Y. Supp. 349; *Cory v. Freeholders of Somerset* (1885) 47 N. J. 181; *Bank of Boston v. U. S.* (1874) 10 Ct. Cl. 519, 545 (per DRAKE, C. J.).—Ed.

The defendant not having complied with this notice, the work was executed by the syndic; and it is proved, that it was done on reasonable terms, and that the work was accepted by the jury.

The appellees urge, that the irregularity in giving notice, if such it be, can have no other effect, than to prevent the police jury from levying the fines which their regulations impose on those who neglect the orders they receive from the syndic; but that it does not authorise the defendant to enrich himself at the expense of others, by refusing to pay for labor, which was both necessary and useful to him.

The merits of the case turn on the correctness of the last position.

It is a maxim, common to the jurisprudence of all countries, that no one is permitted to profit by the labor of another, without compensating him for it. *Jure naturæ equum est, neminem cum alterius detrimento et injuria fieri locupletiores.* On this principle, the Roman jurists held, that he who acted for another by transacting his business, or by making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs; provided the acts of the *negotiorum gestor* were necessary and useful to the person for whom he acted. This doctrine has descended to us, and makes a part of the positive legislation of the state. Dig. Liv. 50, tit. 17, L. 206, *ibid.* Liv. 3, tit. 5, L. 10, 10, 8, 1. Toullier, Droit civil Français, vol. 11, tit. 4, cap. 1, No. 49. C. Code, 2274 and 2278.

We have, then, to examine, whether the work done was useful and necessary to the defendant; and if it was, whether the neglect of the police jury to give notice, enables the appellant to profit by their labor without paying for it.¹

If such were the obligations imposed on the defendant, the danger to which he was exposed by leaving his levee out of repair was great, and the work done can be regarded in no other light, than useful and necessary to him. He is a resident of South Carolina. His plantation was uninhabited, and he had no agent here; or if he had, there is no proof of that fact. The repairs made by the appellees, we are bound to believe, prevented the plantation of the appellant from inundation, and saved him from the responsibility he would have fallen under to his neighbours, had their property been injured by his fault. He should, therefore, pay for the labour by which he was benefited; and it would be unjust that, in this manner, he should enrich himself at the expense of others.

This doctrine does not in any manner impugn that on which the case of Bouligny v. Dormenon & als. was decided in this court. There the proprietor interfered before the contract made by the police jury had been carried into effect, and he succeeded, because the regulations for the construction of the levees had not been promulgated, and were

¹Examination of question of notice omitted. The court holds that the lack of formal notice is immaterial as a defence to a claim for payment of labor and services by which he was benefited.—Ed.

not binding on the inhabitants of the parish. Here the obligation existed, in virtue of rules which had the force of law. The contract has been executed, and the question is not what would have been the right of the appellant had he come forward to prevent the work being done. It is possible he might have chosen to brave all the consequence, and let the plantation remain without proper levees until duly notified. But his responsibility now, cannot be tried by that test. It is by a reference to his duties, and to a presumed obedience to them, had he been here, that the rights of the negotiorum gestor are to be ascertained. Such an argument might be used in any and every case, and would render the whole doctrine of our law on this subject useless, and of no effect. *Si quis absentis negotia gesserit, licet ignorantis; tamen quidquid utiliter in rem ejus impenderit, vel etiam ipse se in rem absentis alicui obligaverit, habeat eo nomine actionem.* Dig. Lib. 3. tit. 5. No. 2.

The failure of the police jury to give notice, cannot defeat this action. It is founded on the great principle of equity, that no man shall profit by the labour of another without compensation; and neither error, nor bad faith, on the part of the negotiorum gestor, will prevent him recovering the amount to which he has benefited another, if the work done was useful and necessary. Dig. Lib. 3. tit. 5. No. 6. 83.

It has been decided in this court, that a sheriff might recover on a *quantum meruit* for keeping slaves, although he had not strictly complied with the law, and could not sustain an action in his official capacity. Vol. 3. N. S. 576.

The judgment of the district court should, therefore, be affirmed with costs.¹

¹As to the limitations of the doctrine of *negotiorum gestor*, see *Jenkins v. Gibson* (1848) 3 La. Ann. 203; *Muligan v. Kenny* (1882) 34 La. Ann. 50. ("We are clearly of opinion that this is a case where the workman has intruded his services, not only without the consent or approval of the owner, but against his will, as plainly inferable from the prior interview between them. In such case, the equitable maxim that no one should enrich himself at another's expense, which is the foundation of the right of the negotiorum gestor, is without application." 11 Toullier, No. 55; 12 Duranton, No. 19; 3 Zachariae, § 441, note 15; 10 Dalloz, p. 778. See also *Fox v. Sloo*, 10 A. 11; *McWilliams v. Hagan*, 4 Rob. [La.] 374; *McCauley v. Hagan*, 6 Rob. [La.] 359.") See also *Railroad v. Turcan* (1894) 46 La. Ann. 155.

"It is essential," says Mr. Howe, "that the *negotiorum gestio* should act for the benefit of another, in order that the obligation we are now discussing should arise. But it seems, in the opinion at least of the highest court of France, Dalloz, June 18, 1872, that there may be cases where he may, as a matter of necessity, act also for his own benefit without prejudice to his rights *quasi ex contractu*." *Studies in the Civil Law*, 175, 176.—Ed.

For the rôle of *negotiorum gestio* in the law of Scotland, see Bell's *Principles of the Law of Scotland*, vol. 1, §§ 540, 541. For the Roman Law (and the provisions of the present German law) see 2 Windscheid, *Pandektenrecht*.

In re BRYANT'S ESTATE.

SUPREME COURT OF PENNSYLVANIA, 1897.

[180 *Pennsylvania*, 192.]

OPINION by Mr. Justice MITCHELL.

When this case was first argued, 176 Pa. 309, the contention was over the corpus of the estate, for which there were five sets of claimants, and the claim of George Lodge for services was treated in the argument as collateral to the case of the English claimants and naturally failing when that failed. Our attention having been called more particularly to the situation of Lodge with regard to the property, we allowed a reargument on that point, and are now satisfied that our previous decision did him injustice. It appears that for several years before the death of Capt. Bryant, Lodge was his man of business for the collection of rents and the management of his real estate, as well as his confidential adviser in other matters. The sudden death of Capt. Bryant without known heirs left Lodge in charge and quasi possession as an agent without a known principal, and therefore with at least a moral duty to look after the property for the real owner, whoever he might prove to be. This duty the orphans' court found that he had performed in good faith, and was entitled to be compensated for. That he accepted the English claimants as the true heirs and endeavored to forward their claim may be excused in view of the fact that the learned court below took the same view. One of the items which seemed most strongly to cast doubt on his good faith was his failure to mention the English heirs at the time the register was considering the subject of administration, but our attention has been called to the material bearing of the rest of his language on that occasion, which was that William and David Bryant, stepsons of the decedent, were the nearest of kin, and there were "no other heirs until further investigation." The reticency of Capt. Bryant about his early

§§ 430, 431; see French Code Civil (edition of Dalloz) arts. 1372-1375; Italian Civil Code (French translation of Prudhomme) arts. 1141-1144 (annotated with references to various European and Spanish-American codes and laws); Spanish Civil Code (edition of Falcon) arts. 1888-1894 (likewise annotated with European and Spanish-American references); Civil Code of Louisiana, arts. 2273-2277, and the various Louisiana Digests, under heading Quasi-Contracts.

Inasmuch as the provisions of the French Code Civil have been widely copied, a reference may well be given to a French treatise in which the French literature on the subject is elaborately considered: Baudry-Lacantinerie & Barde, *Traité de Droit Civil: des obligations* (3d part) pp. 1043-1063.—Ed.

history and family connections might fairly excuse a witness in being cautious about answers on that subject.

As the result of further consideration of this subordinate part of the case, we are not satisfied that the learned court below committed any error in holding that Lodge had rendered services to the estate for which he was entitled to be compensated, and in fixing the amount.

So much of the order of this court heretofore entered, as reverses the decree of the court below upon the claim of George Lodge is now rescinded, and the decree as to that item is affirmed. This order however to be without prejudice as to any intervening rights or action of the administrator, and in case the latter has accounted fully for the assets in his hands, the said George Lodge shall be entitled to retain the amount allowed him by the orphans' court and also the costs of this reargument out of any moneys of the estate in his hands from rents or other sources.¹

¹For illustrations of a not dissimilar doctrine, see Howes' Studies in the Civil Law, 176-178, and cases there cited.—ED.

While *negotiorum gestio* is somewhat of an exotic in the Common Law, it is perfectly familiar to the student of admiralty law, and of daily application the world over in courts of maritime jurisdiction. The doctrine is quasi-contractual in its nature and application.

In *Faleke v. Scottish Imperial Ins.* (1886) L. R. 34 Ch. D. 234, 248, Lord Justice BOWEN refused to recognize it in a common law case:

"The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

"There is an exception to this proposition in the maritime law. I mention it because the word 'salvage' has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman Law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

For the doctrine of salvage and its application, see Ames' Cases on Admiralty, 260-292.—ED.

CHAPTER III.

NATURE OF THE OBLIGATION.

SECTION I.

WHEREIN QUASI-CONTRACT DIFFERS FROM A PURE CONTRACT.

1. EFFECT OF STATUTE OF LIMITATIONS.

SHERWIN *v.* CARTWRIGHT.

TRINITY. COMMON PLEAS, 1631.

[*Hutton*, 109.]

SHERWIN brought a Writ *De rationabile parte bonorum* against Cartwright, and counted of Custom in the County of *Nottingham*, and shew all specially, and the conclusion was, that he detaineth particular Goods of the party Plaintiff, which appertained to him as his part and portion: And upon *Non detinet* pleaded, it was found that the Plaintiff was intituled to this Action many years before the Statute of 21 Jac. and that he had not brought his action within the time limited by the said Statute. And upon the special Verdict, the Case being argued by Serjeant *Ward* for the Plaintiff, it was adjudged for the Plaintiff.

First, because that this action is an Original Writ in the Register, and is not mentioned in the said Act, and though that the Issue is *Non detinet*, yet this is no action of Detinue, for a Writ of Detinue lies not for money, unless it be in bags, but *Rationabile parte bonorum* lies for money in *Pecuniis numeratis*, *vide* the Book of Entries, *Rationabile parte bonorum*: And this action lies not before the Debts be paid: And the Account was, that thereby it might be known for what it should be brought, and that in many cases requires longer time then the Statute gives.

Another reason was, That Statutes are not made to extend to those cases which seldom or never happen, as this case is, but to those that frequently happen.

Also this Statute tolls the Common Law, and shall not be extended to equity. And upon all these reasons the Court gave Judgment for the Plaintiff: And Serjeant *Ward* argued well, and vouched divers good Cases.

The Writ of Detinue supposeth property in the thing demanded, *vide* 50 E. 3. 6.¹

¹For the writ "de rationabili parte bonorum," and the custom for which it is appropriate, see Fitzherbert, *New Natura Brevium*, 122; see also Hodsdon *v.* Harridge (1670) 2 Williams' Sammers, 66a (note 9) for a discussion of the principal case and the question involved.—Ed.

TALORY v. JACKSON.

TRINITY. KING'S BENCH, 1633.

[3 Croke, 513.]

DEBT upon the 2. Edw. 6. c. 13.¹ for carrying away his corn, the tithes not being set out 20. Jac. 1. and 21. Jac. 1. and so until 11 Car. 1. The defendant pleaded for the last three years *non debet*, and for the residue, the statute of 21 Jac. 1. c. 16. of Limitations. And hereupon the plaintiff demurred; and the record being read, ALL THE COURT held, that the statute doth not extend to this action.

Whereupon *Rolle*, for the defendant, moved, that the demurrer should be waived, and they would plead *non debet* for all.—But THE COURT said, it could not be without the plaintiff's consent.²

¹This statute of 1548 provided in brief a three-fold penalty for failure to pay tithes according to custom.—Ed.

²In *Bullard v. Bell* (1817) 1 Mas. 243, STORY, J., speaking of shareholder's liability by statute, said: "It would be very artificial reasoning to consider it a case of contract. It is certainly not a case of express contract; and the most that can, by the utmost straining, be established, is, that it is a case arising *quasi ex contractu*."

"[It [St. Lim. 21 Jac.] applies to such contracts only as are contracts in fact, and not to such obligations *quasi ex contractu*, as are imposed, either expressly or constructively by mere law." *U. S. Bank v. Dallam* (1836) 4 Dana, 574, 577.

And in *Banks v. Darden* (1855) 18 Ga. 318, 341, it is said: "The liability of the directors and shareholders is not strictly a contract, although from convenience it is frequently called so; but it is an obligation *quasi ex contractu* which is imposed by operation of mere law."

In an earlier case the Supreme Court of Georgia held: "To sustain the position that an action of debt founded upon a *statutory liability*, has never been considered as being within the Statute of Limitations of 21st James I. chap. 16th, of England, or of the like statutes in this country, but that such *statutory liability* has always been regarded in the *nature of a specialty*, the following authorities may be, in our judgment, most confidently relied on: 6th Bacon's Abridgment, new edition, 377, letter D. Limitation Personal Actions; Angell on Limitations, 82, 83; Ballantine on Limitation of Actions, 88; Comyn's Dig. 413. Temps. G. 15; *Talory v. Jackson*, Croke Car. 513; *Jones v. Pope*, 1 Saunders' Rep. 37; *Pease v. Howard*, 14 Johns. Rep. 480; *Bullard v. Bell*, 1 Mason's Rep. 243; *Griffin v. Heaton*, 2 Baily's R. 58. In *Ward v. Ruder*, 2 Harr. & Mell. Rep. 154, the court said: 'An action grounded upon a *statute*, cannot be barred, such as debt for an escape, etc.'" *Lane v. Morris* (1851) 10 Ga. 162, 165. But see *Harris v. Smith* (1882) 68 Ga. 461.

So also the liability for calls in a railway company, *Cork & Bandon Rway. Co. v. Goode* (1853) 13 C. B. 826; so also, the liability for maritime tolls, *Shepherd v. Hills* (1855) 11 Ex. 55, per PARKE, B. (but see *Tobacco Co. v. Loder* (1851) 16 Q. B. 765); *Atwood v. Bank* (1850) 1 R. L. 376.

In the following cases the liability of a stockholder was held to be within

JONES v. POPE.

MICHAELMAS. KING'S BENCH, 1667.

[1 *Williams' Saunders*, 37.¹]

DEBT on an escape.²—The plaintiff declares that he, on the 14th of June, 1654, prosecuted, out of the then court of the upper bench, a writ of *testatum capias ad satisfaciendum*, against one *Fabian Hill*, directed to the sheriffs of the city of *Bristol*, whereby the sheriffs were commanded that they should take the said *Fabian Hill*, to have his body before the late pretended Protector *Oliver*, &c. in the upper bench at *Westminster*, on *Saturday* next after one month of *St. Michael*, to satisfy the plaintiff of £1000 debt and £7 6d. costs, by force of which writ the defendant and one *Thomas Bull*, then sheriffs of the said city, afterwards, to wit, on the 10th of *August*, in the year above-said, within the same city, took the said *Fabian Hill* in execution for the debt and costs aforesaid, and had him in their custody until afterwards, to wit, on the first of *September*, in the year 1654 aforesaid, the said now defendant and the said *Bull*, being then sheriffs, let the said Hill at large, and suffered him to escape, the plaintiff not being satisfied his debt and costs, and that afterwards Bull died, whereby an action accrued to the plaintiff to demand and have his debt of the defendant, being the surviving sheriff, yet the said, &c. The defendant pleads in bar, that the plaintiff's bill was exhibited against him on the 21st of *November*, in the 17th year of the reign of the now king, and that since the cause of action accrued, six years and more were elapsed before the day of the exhibiting the said bill. And this, &c. Wherefore, &c. Upon which plea the plaintiff demurred in law.

And *Jones*, of counsel with the plaintiff, argued against the plea, that an action of debt for an escape is not within the statute of limitations of 21 Jac. 1. c. 16. For the words of the statute are: "All actions of debt, grounded upon any lending, or contract, without specialty, all actions of debt for arrearages of rent, shall be brought within six years," &c. But he said, that an action of debt on an *escape* is not within the statute, for two reasons. First, because the action is not founded upon any *lending* or *contract*; and the statute does not limit all actions of debt generally, but only actions of debt founded upon a *lending* or *contract* without specialty; and this is a debt created by the *law* without any lending or contract, and therefore is not limited

the Statute of Limitations: *Corning v. McCullough* (1847) 1 N. Y. 47; *Terry v. Calnan* (1879) 13 S. C. 220; *Carrol v. Green* (1875) 92 U. S. 509, 515, where *Bullard v. Bell* (1817) Mas. 243, *supra*, was expressly disapproved.—ED.

¹Reported also in 1 Sid. 306, 2 Keb. 93, and 1 Lev. 191.—ED.

²The latter part of the opinion on another point is omitted.—ED.

or restrained by the statute. Secondly, he said, that the action of debt on an escape is founded upon a specialty, namely, upon statute law, and so out of the statute of limitations. For at common law no action of *debt* lay against a gaoler for an escape out of execution, but only an *action upon the case*, as appears in 2 Inst. 382.¹ Then the statute of 1 Ric. 2. c. 12. gives to creditors an action of debt against the warden of the *Fleet* upon an escape out of execution, and the statute by construction extends to all other gaolers and sheriffs. And so the statute is a specialty, upon which the action is founded; and therefore it is clearly out of the words and intention of the statute of limitations, which only limits actions of debt without specialty. And he further said, that although the words of the statute of limitations are general, as to the limitation of all actions of debt for arrearages of rent, yet it had been adjudged that an action of debt for the arrearages of rent *reserved by indenture* was not within the intention of the said statute. Hutton's Rep. 109. Freeman and Stacie's case. And so, he said, it had been adjudged upon the statute of 2 & 3 Ed. 6. c. 13. of tithes, that an action brought upon that statute was not within the statute of limitations, because it was founded upon a specialty, namely, the act of Edw. 6. Cro. Car. 513. 15 Car. 1. Talory and Jackson's case. And therefore he concluded the plea was bad.

Saunders è contrà. And that the plea was good. And he said, that the action of debt upon an escape was within the statute of limitations, because, although it is not founded upon a *lending* or *contract* properly, yet the law has made a contract, and the statute intends to limit all actions of debt founded upon a contract without specialty, and has not distinguished between contracts in law and in fact, but includes all. And he further said, that the action is not only founded upon the statute of 1 Ric. 2. but upon the escape, which is a naked matter of fact: for though the statute and also the judgment and writ of execution are of record, and so specialties, yet the escape, upon which the action is founded, is a mere matter of fact. For if the action were founded upon a record, the defendant could not plead *nil debet*; for

¹In which case the creditor might recover damages for the officer's misconduct; but still an action lay against the original debtor. But the statutes Westminster 2. and 1 R. 2. c. 12. gave an action of *debt* against the sheriff or gaoler to recover at once the sum for which the prisoner was charged in execution. These being affirmative statutes do not take away the common law remedy; so that the creditor has still his election; if he adopts the action of debt, it is said, that he is entitled to recover the whole debt, and sheriff's poundage; 2 Term Rep. 129. Bonafous v. Walker, per BULLER, Justice; 2 H. Black. 113. Alsept v. Eyles; 2 Black. Rep. 1048. Hawkins v. Plomer; but if he brings an action upon the case, he will recover such damages as the jury are inclined to give. 2 Term Rep. 132. Bonafous v. Walker; and in this action the defendant is at liberty to plead the statute of limitations, as well because the action lay at the common law, as because the words of the statute are '*all actions upon the case*,' &c. 1 Sid. 306." Williams' note.

this is no plea to a specialty; but without doubt the defendant can plead *nil debet*. And so it seemed to him that the plea was good.

But for the reasons of *Jones*, the court held the plea bad, and that the action was not within the statute of limitations.¹

HODGSON v. HARRIS.

TRINITY. KING'S BENCH, 1670.

[1 *Levinz*, 273.]

DEBT on an Award; the Defendant pleads the Statute of Limitations: On which the Plaintiff demurs, because by *Saunders* it is not a Debt upon a Contract or Lending within the Words of the Statute: To which it was answered by *Jones*, That the Submission to the Award is a Contract to pay the Sum awarded: and cited 3 Cro. 600. Bowyer against Garland. The Court inclined to the Opinion, That it was not within the Statute: And *Twysden* said, That Debt for a Copyhold Fine had been adjudged not to be within the Statute; whereupon *Jones* offered to waive the Demurrer and go to Issue, which *Saunders* refused; and it was adjourned.²

WILSON & UX. v. TOWLE.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1848.

[19 *New Hampshire*, 244.]

DEBT. The plaintiffs declared that Levi Towle, late of Epping, deceased, being seized in fee of certain lands described in the declara-

¹Accord: *Cockram v. Welby* (1678) 2 Mod. 212.

"It has been settled, that an action of debt for an escape is not within the statute of limitations, because it is founded, not on any contract in fact, but on the legal liability imposed by the statutes of Westminster 2 and 1 R. 2. c. 12, which gave an action of debt against the sheriff or jailer, to recover the debt for which the prisoner had been committed to his custody in execution of a judgment; and therefore the suit was founded on the statute alone, which is deemed in effect a specialty. *Jones v. Pope*, 1 *Saunders*, 36, 37, 38, and notes; *Hodsden v. Harridge*, 2 *ib.* 64, 65, and notes, and cases there cited." *Bank of U. S. v. Dallam* (1836) 4 Dana, 574, 577.

See also, Angell on Limitations (6th ed.) 79 *et seq.*; Buswell on Limitations and Adverse Possession, 208 *et seq.*; Wood on Limitations, sec. 33.—Ed.

²For the history of the submission to an award and the implied or express promise contained therein, see Mr. Ames in 2 Harv. Law Rev. 62.

For the doctrine of the principal case, see Angell, 88; Buswell, § 152; Wood, sec. 33 and notes.—Ed.

tion, by his last will devised the same to the defendant and his heirs, he, the said Gardner Towle, paying the sum of one hundred dollars as thereafter named; that in and by said will the testator afterwards gave to his daughter, the said Pema Wilson, fifty dollars in money, to be paid by said Gardner. Levi Towle afterwards, on the twenty-fourth of May, 1827, continuing so seized of the lands described, died, and his will was admitted to probate. That the defendant accepted the devise, entered the premises, remained in possession thereof, and thereby became chargeable to the said Pema to pay her the said sum of fifty dollars, according to the devise aforesaid, and the said Gardner still holds the premises, whereby an action hath accrued to the plaintiffs, &c.

The defendant pleaded, among other pleas, that the supposed cause of action did not accrue to the plaintiffs at any time within six years next before the commencement of the suit.

To this there was a demurrer and joinder therein.

The writ was dated the fourth day of May, 1847.

WOODS, J. The question raised by the demurrer does not derive its solution from the chapter of the Revised Statutes relating to the limitation of suits. They had not been in force six years at the time this action was commenced, except with respect to those cases in which the period of limitation prescribed by former statutes had begun to run, and the same or a similar limitation is prescribed by the Revised Statutes. The inquiry, therefore, is whether this action was barred, or could have been barred, by a lapse of six years, by virtue of the statute of June 30, 1825, which was in force until repealed, with the qualification before noted, by the Revised Statutes, in 1842.

The only clause in that statute which is supposed to affect this action, is that which limits to the period of six years next after the cause of such actions, "all actions of debt grounded upon any lending or contract not under seal." The act of June, 1791, in force previously to that time, contains the clause as it originally stood in the statute of 21 Jac. 1, ch. 16, "all actions grounded upon any lending or contract, without specialty," a broader expression and comprehending all actions, it would seem, which could possibly fall within the purview of the statute which has been cited as governing this case.

There are two cases in Saunders which deserve to be cited as among the earliest in which this clause of the statute of 21 Jac. 1, was judicially drawn in question. The first is *Jones v. Pope*, 1 Saund. 34, which was debt against a sheriff of Bristol, for an escape. The defendant pleaded in bar that the plaintiff's bill was exhibited against him, on the 21st of November, in the 17th of the now king, and that since the cause of action accrued, six years and more were elapsed before the day of exhibiting the said bill. The plaintiff demurred, and it was argued in his behalf that the action was not within the statute, first, because not founded upon any lending or contract, and

secondly, because it was founded upon a statute which was a specialty, the statute, namely, of 1 Ric. II. For the defendant it was argued that, although the action was "not founded on a contract or lending, properly, yet the law has made a contract," &c. But the court held the plea bad, for the reasons stated by the plaintiff's counsel.

The other case referred to is *Hodsden v. Harridge*, 2 Saund. 63, which was debt on an award made by an umpire, under his hand and seal, in pursuance of a parol submission. The plea was, the statute of limitations, and upon demurrer, two points were made. 1. That the award was a specialty. 2. That the case was not one of lending or contract. The whole court were for the plaintiff; the Ch. Justice mainly upon the first point, *TWISDEN* upon the second, and the other judges upon both.

The case of *Cockram v. Welby*, 2 Mod. 212, was debt to recover money of the sheriff of Lincoln, levied by Fi. Fa. It was argued for the defendant, on demurrer to a plea of the statute of limitations, that when the sheriff had levied the money, the law created a contract (without specialty) on his part to pay it over. The judgment was for the plaintiff, however.

It has likewise been held that an action of debt for a legacy is not barred by the lapse of six years, not being within the statute. *Com. Dig. Temps.* 15.

In *Jordan v. Robinson*, 3 Shepley, 167, it was, upon the same grounds, held that a foreign judgment is not subject to the statute.

In conformity with these decisions, it has been held as a general principle, that actions of debt founded upon a contract, without specialty, are such as are founded upon a contract in fact, and not created by construction of law. *Pease v. Howard*, 14 Johns. 479; *Richards v. Brickley*, 13 Serg. & Rawle, 395.

Finally, in the case of *Sanborn v. Sanborn*, in this State, decided in Rockingham, July term, 1845, the same question here presented arose in an action of debt, for money charged upon land by a will. It was held upon demurrer to a plea of the statute of limitations, that the case did not fall within it. It was not a case of lending or contract of any kind, within the meaning of the statute.

The debt in this case results from the tenure of the land. It is a charge upon it, into whose hands soever the land passes, created by the act of the owner, and resting in no just sense upon any contract, express or implied. Although in England this charge would seem to be commonly enforced in equity, yet it has been held there that debt would lie against the terretenant for the recovery of the money so charged. *Ewer v. Jones*, 2 Salk. 415; 6 Mod. 25, S. C.

It is, indeed, called a debt, and owes its inception to the voluntary act of the terretenant or devisee, in accepting the devise, or a title under it. So, indeed, does the obligation to pay money resulting from the violation of a penal statute, which money, like this, is recoverable

in an action of debt, in favor of a private person. Yet, in neither case is the debt, in any reasonable sense, founded on any contract.

The case, therefore, does not fall within the provisions of the statute of limitations, and the demurrer must prevail.

Judgment for the plaintiffs on the demurrer.

PEASE v. HOWARD.

SUPREME COURT OF JURISDICTION OF NEW YORK, 1817.

[14 *Johnson*, 479.]

VAN NESS, J., delivered the opinion of the Court. The words of the statute of limitations are, "that all actions upon the case, &c., and all actions of debt for arrearages of rent, or *founded upon any contract without specialty*, shall be commenced and sued within six years, &c." Whether a justice's Court is strictly a Court of Record, it is not material to determine in this case: for if it be not, it is settled, that a judgment rendered in it is conclusive evidence of a debt, and the merits of such a judgment, while it remains in force, cannot be overhauled or controverted in an original suit at law, or in equity; and it is as final, as to the subject matter of it, to all intents and purposes, as a judgment in this Court. A foreign judgment, being *prima facie* evidence of the debt only, has been considered as of no higher nature than a simple contract; and a necessary consequence of this is that the statute of limitations may be pleaded to it. But a judgment in a justice's Court is of a higher nature than a foreign judgment, because its merits cannot be controverted in a suit founded upon it. In the case of *Walker v. Witter* (Doug. 1), which was an action upon a judgment obtained in the Supreme Court of *Jamaica*, Lord MANSFIELD says, the question was brought to a narrow point: for it was admitted, on the part of the defendant, that *indebitatis assumpsit* would have lain, and on the part of the plaintiffs, that the judgment was only *prima facie* evidence of the debt. "*That*," says he, "being so, the judgment was not a specialty, but the debt only a simple contract debt." From this it would seem to follow, that if the judgment had been *conclusive* evidence of the debt, it would have been a specialty, and that, of course, the statute of limitations could not have been a bar. This view of the question seems to derive great weight from the nature and effect of a specialty, which, being under seal, imports a consideration, and the want of one cannot be alleged by plea: this, and the solemnity which attends the execution of it, are the only reasons why it ranks higher in the scale of contracts than a writing without seal, or a mere parol agreement. But it may be shown, that a specialty is founded upon an illegal consideration, and it is not always con-

clusive evidence. In this respect, it is inferior to a justice's judgment, and the solemnities attending the rendition of the judgment are equal, at least, to the sealing and delivery of a specialty. A justice's judgment is a debt of a higher nature than a simple contract debt, and is as much a specialty as a judgment obtained in this Court, which, clearly, is not barred by the statute of limitations.

Neither is a debt of this description within the words of the statute; and every statute of limitations, being in restraint of right, must be construed strictly. It is not a bar to every action of debt, but only to those brought for arrearages of rent, or founded upon *any contract*, without specialty. It has been held that debt on an indenture reserving rent, is not within the statute, notwithstanding the generality of its terms; (1 Saund. 38) and the settled construction of the statute is, that it applies solely to actions of debt founded upon contracts in fact, as distinguished from those arising by construction of law. Now, in this case the action is not founded upon a contract in fact. It has been held that debt upon a recovery in trover or trespass in the *county Court* or *Court baron*, and in various other inferior tribunals in *England*, is not founded upon any contract in fact between the parties, and, therefore, not barred by the statute. (2 Saund. 64, 65, &c.. in notes and cases there cited.) Such, too, is the case of an action of debt founded upon a statute; for which this reason is given, that a statute is a specialty. (1 Saund. 36, 37, in notes.)

Upon the whole, therefore, I conclude, that an action of debt upon a judgment in a justice's Court is not barred by the statute of limitations; 1. Because as such judgment is conclusive evidence of the debt, as has been invariably determined by this Court, it is a debt by specialty, and not by simple contract merely, as a foreign judgment is; and, 2. Because the action is not founded upon a contract, in fact, within the meaning of the statute, and actions of that description only are within its words, and not actions of debt, without specialty, generally.

*Judgment reversed.*¹

¹"The judgment of a justice of the peace or other inferior tribunal (in a case where jurisdiction of the parties and subject-matter appears from the face of the proceedings), so long as it remains unreversed, is, for every purpose, as binding and conclusive between the parties as that of the highest court of record in the state." 2 Black on Judgments, § 522, citing principal case.

In *Carshore v. Huyck* (1849) 6 Barb. 583, 588, it is very properly said: "It is only since the adoption of the revised statutes that justices' judgments have been subject to the operation of the statute of limitations (*Pease v. Howard*, 14 John. 479)."

See also, Angell, 79 *et seq.*; Buswell, §§ 149-151 and notes; Wood, secs. 30, 31, 34 and notes.—Ep.

RICHARDS, ADM'R, v. BICKLEY, ADM'R.

SUPREME COURT OF PENNSYLVANIA, 1825.

[13 *Sergeant & Rawle*, 395.]

DUNCAN, J.¹ The plea of *causa actionis non accrevit infra sex annos*, was first offered when the jury was impannelled, under the act of 1806. I recommended it to the counsel to put in the plea, and on demurrer, the question whether in an action of debt on a judgment in Barbadoes, which judgment was founded on a specialty, as appeared by the declaration, the statute of limitations was a good plea, would be decided in bank. This has been done.

If this be a defence, the adjudged cases prove that it may be taken advantage of on the plea of *nil debet*, but the modern practice is to plead it specially, the debt, as is said, not being extinguished, but the remedy only barred. The statute of limitations of *James*, so far as regards personal actions, is re-enacted in our limitation act of 1713.

The action on a foreign judgment was little known when the statute of limitations passed, and does not appear to have been in the view of the legislature of either country; and it has been said of that statute that it was not made to extend to those cases which seldom or never happen, but to those only which frequently happen. Hutton 109. The first and only case to be found in the *English* books of Reports, in which notice is taken of this plea to a foreign judgment, was the case in chancery, of Dupelin v. Roven, 2 Vern. 540, and where it was held to be pleadable, as the Lord KEEPER said, because the only action that could be maintained was *indebitatus assumpsit* or *insimul computasset*. Even so late as the reign of *George* II., in *Otway v. Ramsey*, 2 Stra. 1090, in a writ of error, from *Ireland*, the great question, as it was called, was whether debt would lie there, on a judgment in the Court of King's Bench, in *England*, and it puzzled the judges not a little; for after two solemn arguments upon which, the court strongly inclined that it would not, a third argument was appointed, but the plaintiff in error, who was defendant, and had judgment against him below, declining an argument, the judgment was affirmed, without any opinion delivered by the court, further than what was said on the breaking of the cause, at the former argument.

I may repeat, with great confidence, what was said by Justice BULLER, in *Walker v. Witter*, in 1778, Douglass, 1, "that we meet with no instance in the books of an action of debt brought on a

¹Statement of the case is omitted.—Ed.

foreign judgment;" and that was the first instance in which the action had been sustained.

I only refer to this case to show how the law stood anterior to the American revolution, and to ascertain a point of time, and not as authority. The statute, it is fair to suppose, had run in that case, as the judgment was in 1766, the statute not pleaded.

This act of limitations is to be construed as all statutes ought to be, without favour or disfavour. Courts ought not to exclude actions within its provisions, nor include those that neither fall within the letter or reason of the law. Without saying whether *non assumpsit infra sex annos*, would or would not be a good plea, where the action was assumpsit, I think that in an action of debt on a foreign judgment, stating the foundation of the judgment to be a specialty, the plea of the statute is not a good one; and though the judgment be the gist of the action, yet the cause of the judgment may be laid by way of inducement in the declaration, as in debt against the sheriff on an escape, or in an action founded on a *devastavit* against an executor; the judgment is but inducement, the escape and *devastavit* are the foundation of the action.

~~It is true it is not necessary to lay the cause of action which gave rise to, or was the consideration of the judgment, yet certainly it may be stated; and might under particular pleadings be material, and it was for some time a moot point, even in assumpsit on a foreign judgment, whether it was not incumbent on the plaintiff to state the original cause: for in *Crawford v. Whittal*, 13 Geo. 3, in the note to *Walker v. Witter*, there was a demurrer to such declaration, for the reason that it did not state the ground of the judgment abroad, and the cause of action there: the demurrer, however, was overruled. *Aston*, Justice, said: "We are not to suppose it was an unlawful debt." In 1771, in *Plaistow v. Vanuxem*, it was moved in arrest of judgment, for that it did not appear the judgment was given on account of a just debt, or for any good and sufficient cause of action; but the matter was overruled.~~

It is said, that actions as well of debt as of assumpsit, are debts on simple contract and therefore within the words of the statute. The words are, "All actions of debt, grounded on any lending or contract without specialty." If it had been all actions of debt, without specialty, this action would have been included; but all actions of debt without specialty, are not limited, but those only grounded on a lending or contract, and this action is not founded on any lending, and therefore not limited, though it be without specialty. All actions of debt are founded on contracts in deed or in law; and if it had been intended to limit all actions of debt generally, the words "grounded on any lending or contract" would have been superfluous. But the statute was only intended to limit those actions which are grounded upon any lending or contract in

fact, and the word lending explains the word contract to be of the same nature; and as early as 20 Car. 2., this construction was put on these words in *Hodsden v. Harridge*, 2 Saund. 65, and this principle has ever since prevailed. It was the construction of the *English* statute when our act passed. The use of cases is said to be, to establish principles, and if the cases decide differently from the principle, we must follow, as judges often have declared, the principle and not the decision.

That case was debt on award for the sum awarded. The award itself was under seal, though the submission was by parol, and held not to be a contract within the statute; though, if the action had been assumpsit to stand to the award, it had been within it; but the case was not decided, as has been supposed in the argument, on the ground of the award being under seal, for there it was contended, and so decided by the court, that if there had been no specialty at all, yet it was not an action founded on a contract; for the statute only restrains and limits actions on a lending or contract in fact, and this action is founded on a debt *quasi ex contractu*, as the civilians term it, where the law gives an action of debt, though there is no contract between the parties. This doctrine, as to parol awards, has been adopted, and is considered as settled law from that day until *Ballentine* published his treatise on the statute of limitations, and never has been contradicted either by the decision or the *dictum* of any judge, or doubted in the speculations of any lawyer.

One would suppose, that as the actions on foreign judgments would increase the commerce of the country, the case of limitations must have frequently occurred, yet no such plea is to be found, except in this one solitary case, and there sustained on a reason that no longer exists, namely, that only the action of assumpsit could be maintained, and for this reason alone, the statute was pleadable. In all the books of practice and treatises on the law, this solitary case has passed unnoticed, except by Mr. *Archbold*, who notices it under the title of assumpsit, and the operation of the statute of limitations on that form of action. The actions of debt without specialty, to which the statute does not apply, are numerous: they will be found in the last *London* edition of Comyn's Digest, 7th vol. p. 415; and they will all be found to depend on this one principle, of the action not being grounded on a lending or contract in fact, or a contract having relation to a record. Debt on escape against sheriff, debt on award, debt for a copyhold fine, debt on the statute for not setting out tithes, debt against sheriff for money levied on a *feri facias*, debt against an attorney for money received by him: so if we are to confine the act to the enumerated actions, it does not fall within any of the denominations of actions: it is neither trespass, nor detinue, nor trover, nor replevin, nor action of account, nor on the case, nor debt grounded on any lending or contract; but an action of debt on a foreign judg-

ment is no more a debt on a contract in deed, than debt on a domestic judgment, and if one has obtained a judgment against another for a certain sum, and neglect to take out an execution, he may afterwards bring an action of debt on this judgment; he shall not be put to proof of the original cause of action, but on showing the judgment in full force, the law immediately applies, that by the original contract of society, he has contracted a debt or is bound to pay it. So that the obligation arises from an implied original contract with society, and not with the individual, like forfeitures on by-laws, amercements, judgments recovered for a tort in an inferior court, penalties, inflicted by law, damages given by statute to the party grieved; these immediately create a debt in the eye of the law, 3 Bl. 160; but they do not fall under the denomination of actions of debt grounded on a lending or a contract. It is not necessary to decide how this would be, on a count on the implied contract to pay the judgment in the action of assumpsit. Yet there would *seem* to be a sound difference between that action and debt, where the party has his choice of remedies, as assumpsit for not performing an award and debt on the award, the statute may be pleaded to the one form of action and not to the other. So the creditor has his election for ~~escape on judicial process~~: he may bring debt where the statute will not apply, or he may bring case where it will. So, in the action for money received against the sheriff, as in *Cochran v. Welby*, 1 Mod. 245: action on the case against the sheriff, for that he levied a sum of money and did not bring it into court on the return of the writ,—plea of the statute of limitations and demurrer, and the distinction was taken between assumpsit and case, and it was admitted that if it had been assumpsit, the statute would be pleadable, S. C. 2 Mod. 212; and the question, on that report of the case, is said to have been,—whether the action was barely grounded on the contract, or had relation to or was founded on a record. And in action of debt, brought by the same plaintiff against the same defendant, it was held that the action lay before the return of the writ. Yet the action is not within the statute of limitations; for though it be not a record before the return of the writ, yet it is founded on a record and has a strong relation to it. 2 Show. 79. So, here, though the action is not immediately founded on a specialty, yet it has a strong relation to it; and there seems to be a prevailing opinion (though I admit it has been questioned by some), that where the whole of a bond has been paid by one of the obligors, who brings an action of assumpsit for contribution, that he would be allowed the same limitation as on the bond itself.

It is not unworthy of remark, that it was supposed that actions on promissory notes, which in some measure partake of the nature of specialties, particularly in the manner of declaring on them, were not within the statutes of 21 Jac. 1; for by statute 3 and 4 Anne, c. 9,

s. 2, it was provided, that actions on promissory notes shall be brought within the time appointed for commencing actions on the case by that statute. Note to *Hodsden v. Harridge*, 2 Wms. Saund. 66. And that much depends on the form of action, as to the operation of the statute, appears by what was said in giving the opinion of the court in *Beattie's Administrators v. Burns*, 9 Cranch, 107. It was a question on the bar of the statute of limitations in an action for money had and received, brought under an act of assembly of *Maryland*, respecting some local provisions as to lands within the District of *Columbia*, and it was, as Mr. Justice STORY said, "a case where the action for money had and received was clearly within the act; but it was contended that the present suit, being a statute remedy, was not within the purview of the statute of limitations. We know of no difference between a common law and a statute right, each must be pursued according to the general rules of law, unless a different rule be prescribed by the statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it."

It is to be observed, as to *Dupelin v. Roven*, that the origin of the debt was simple contract; the foreign judgment did not change it,—it still retained that ground, and composition and note given in 1676, and bill not filed for thirty years after,—from the length of time equity would presume all to have been satisfied without recourse to the statute of limitations. This appears to me as very clear; for the presumption of payment of a foreign judgment, unless repelled by circumstances, would prevail at the end of twenty years, as it does in cases of legacies, mortgages, and all specialties, though not falling within the provisions of any statute. But the cases from 5 and 11 Johns. Rep., cited by the counsel for the defendant, weigh much more with me: they are, however, decided without argument, and without reference to any direct authority except the case in *Vernon*, or to any analogous principles; and it certainly was decided on a mistaken view of the constitution of the *United States*, as to the nature of a judgment in a sister state. *Andrews v. Montgomery*, 12 Johns. 173.

The case of *Pease v. Howard*, 14 Johns. 149, decided that a judgment in a justice's court was not within the statute of limitations; for it was not like a foreign judgment, but it formed conclusive evidence of the debt, and is not therefore a debt by simple contract, but by specialty; yet, at the same time, it is observable, that it was not decided on that ground alone, but on an acknowledged principle, which pervades in the construction of all actions of debt, without specialty, "that the actions of debt, founded on any contract without specialty, which are barred by the act of limitations, are only actions of debt founded on a contract in fact, and not such debts as are created by the construction of law."

This last reason leads to the certain conclusion, that actions of

debt on foreign judgments are not within the limitation,—as they are neither within the words or intention of the legislature. They are not grounded on a lending or on a contract, in the sense in which that word is used in the act; for that is a contract created by a construction of law,—the action of debt limited is on a lending or contract in fact or in deed.

The case in 5 and 11 Johns. Rep. have not been considered with that deep research for which the judges of that court were so highly distinguished; and, with the greatest deference to those eminent men, these decisions appear to me to be at variance with principle, and with a principle acknowledged in the subsequent case of *Pease v. Howard*: a principle which fixes a general construction, without any exception,—a general rule, that knows no distinction. The court therefore direct judgment to be entered for the plaintiff.

Judgment for the plaintiff.¹

2. SET-OFF AND COUNTERCLAIM, ATTACHMENT AND ARREST IN QUASI-CONTRACT.

WOODS v. AYRES.

SUPREME COURT OF MICHIGAN, 1878.

[39 *Michigan*, 345.]

ERROR to Huron. Assumpsit.

GRAVES, J.² In the fall of 1871, a claim in favor of the firm of

¹Accord: *Jordan v. Robinson* (1838) 15 Me. 167. On theory the principal case would seem to be correct and unanswerable, but the authorities are in accord with *Dupleix v. De Roven* (1705) 2 Vern. 540, *ante*. The law is stated in *Black on judgments* (§ 850) as follows:

"It is well settled that the statute of limitations of the country of the former may be pleaded in bar of an action on a foreign judgment." This follows necessarily from the doctrine that such judgments are not records. For if they possess no higher character than simple contract debts, it is obvious that they must be barred by the same period of limitation, which is that of the *lex fori*."

"The statute of limitations of the state of the forum may be pleaded in defence to an action on a judgment of a sister state, if the statute is so framed as to include judgments. . . . The statute of limitations is available as a defence only against the judgment, not against the original cause of action" (*ib.* § 892).

"In most, if not all, of the states the statutes of limitation either expressly prescribe a period within which suits on judgments must be brought, or are so framed as to include such actions by necessary implication" (*ib.* § 985, citing cases).—Ed.

"Only that part of the opinion is given relating to the question of the plea of set-off and the nature of quasi-contracts.—Ed.

Ayres, Learned & Wiswall arose against plaintiffs in error for four dollars per thousand feet upon a quantity of pine saw logs delivered by the firm to plaintiffs in error under an agreement for their delivery subject to that drawback, to replace others the firm had cut on lands of the plaintiffs in error.

Second. Plaintiffs in error offered to show by way of set-off a demand in their favor for moving certain logs of "Ayres, Learned & Wiswall" in the Pinnebog river in the season of 1871 pursuant to the act of 1861 as amended in 1863 to regulate the "floating of logs and timbers in the streams of this State" (Sess. L. 1863, p. 374): and a further demand in their favor for moving logs of "Ayres, Learned & Co." in the same river in the season of 1872 and pursuant to the same law. Upon objection by defendants in error the court ruled against the offer.

Assuming that all the conditions were present to generate a liability under this statute, were the demands enforceable under the set-off law? If they were not, the ruling was correct. In order to decide upon this it is necessary to consider of what nature the demand is on which this statute impresses the right of enforcement, and whether the statute of set-off fairly comprehends it.

The right of set-off at law is given and limited by statute. The common law never recognized it. Bac. Ab. tit. "Set-off."¹ The provisions concerning set-off must therefore be consulted to see in what cases and in what circumstances the right is admitted. Unless a case is positively embraced by the specifications enacted by the Legislature, the remedy is absolutely denied and the claim will remain to be separately enforced as though there were no such statute.

"At common law, if the plaintiff was as much, or even more indebted to the defendant than the defendant was indebted to him, yet he had no method of striking a balance; the only way of obtaining relief was to go into a court of equity. To remedy this in convenience it was enacted by the statute of 2 G. 2, c. 22, § 13, 'That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other; and such debt may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt intended to be insisted on, and upon what account it became due; otherwise such matter shall not be allowed in evidence upon the general issue.'"² 8 Bacon's Abridgment (Bouvier's edition), 640.

For the origin, nature and judicial construction of the statutory set-off, see *Collins v. Collins* (1759) 2 Burr. 820; *Green v. Farmer* (1768) 4 Burr. 2214, per Lord MANSFIELD, C. J.; and see *Waterman on Set-off, Recoupment, and Counterclaim*, 10 *et seq.*; H. Kent's Com. 13th ed. *473 n (h); Sedgwick, *Measure of Damages*, c. xvii.—Ed.

Now the first pre-requisite under the law allowing set-off is that the demand has arisen "upon judgment, or upon contract express or implied" (Comp. L., § 5796, subd. 1), and unless it has originated in one of these ways it is incapable of being set off. The demands in question did not arise on judgment or upon express contract. So much may be taken for granted. If then, they were capable of being set off, it must be because they arose on implied contract. Did they originate in that way? The question is not whether they constituted assumpsits in some metaphorical or artificial sense,—whether under the license allowed in modern times in applying forms of action they might not be sued in assumpsit,—but it is whether in the sense of the statute of set-off they were causes of action on true implied contract.

In early times the want of a common law remedy suited to cases of non-performance of simple promises caused frequent recourse to equity for relief; but at length in the 21st of Henry VII it was settled by the judges that an action on the case would lie as well for non-feasance as for malfeasance, and in that way assumpsit was introduced. In theory it was an action to recover for non-performance of simple contracts and the formula and proceedings were constructed and carried on accordingly. Very early there were successful efforts to apply it beyond its import, and from the reign of Elizabeth "this action has been extended"—as Mr. Spence informs us—"‘conscience encroaching on the common law’—to almost every case where an obligation arises from natural reason, and the just construction of law, that is, *quasi ex contractu*;" and is now maintained in many cases which its principles do not comprehend and where fictions and intendments are resorted to, to fit the actual cause of action to the theory of the remedy. It is thus sanctioned where there has been no actual assumpsit—no real contract—but where some duty is deemed sufficient to justify the court in imputing a promise to perform it and hence in bending the transaction to the form of action. 1 Spence Eq. Jur. 243, 244, 245; Hosmer v. Wilson, 7 Mich. 294; Ward v. Warner, 8 *id.* 508; Watson v. Stever, 25 *id.* 386, and other cases in this court.

This tendency to apply assumpsit to causes of action foreign to its original spirit and design is apparent in our legislation. The statute allows it to be brought on judgments and sealed instruments (Comp. L., § 6194), also for penalties and forfeitures (§ 6841), and by commissioners of highways for expenses laid out on bridges required to be maintained by private parties (§ 1311). There are other instances in the laws.

The arbitrary use which has been made of the action has caused many incongruities and no little confusion. The practice of strained constructions and the invention of fictions and intendments to subject causes of action to the remedy which were foreign to it, has led somewhat to a confounding of transactions which are not contracts with those which are and to a neglect of obvious and necessary distinctions.

But it may be observed in passing that it is not the only occasion where inaccuracies have been generated by a too close adherence to the plan of studying causes of action through the forms of action. The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued in *assumpsit* and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding. Permission to apply the action to a transaction not involving any real contract relation between the parties cannot change the true nature of the transaction and transform it into matter of contract. Courts cannot make contracts for parties. And the fictions and intendments permitted for the sake of the remedy are explainable whenever necessary.

It seems scarcely necessary to add that the determination by a majority of the court (*Chapman v. Keystone &c. Co.*, 20 Mich. 358) that the party moving logs as contemplated by the first section of the act of 1861 as amended in 1863, acquires a distinct right of action against the log owners *enforceable in assumpsit*, is of no force whatever to show that such a demand arises on implied contract.

Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself. *Marzetti v. Williams*, 1 B. & Ad. 415; *Beirne v. Dord*, 1 Seld. 95. To constitute either the one or the other the parties must occupy towards each other a contract status, and there must be that connection, mutuality of will and interaction of parties, generally expressed though not very clearly by the term "privity." Without this a contract by implication is quite impossible. *Broom's Com. on Com. L.* 317; *Broom's Phil. of Law*, 18. 23, 24, 25, 29, 34; 1 *Austin's Juris.* 325, 326; 2 *id.* 946, 948, 1018. Cases in illustration are numerous. *Blandy v. DeBurgh*, 6 C. B. 634.

Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground *more probable* than that of a promise of recompense, no promise will be implied. The contract connection is not established. *Bartholomew v. Jackson*, 20 Johns. 28; *James v. O'Driscoll*, 2 Bay. 101; *St. Jude's Church v. Van Denberg*, 31 Mich. 287; *Livingston v. Ackeston*, 5 Cow. 531; *Nicholson v. Chapman*, 2 H. Black. 254; *Smart v. Guardians of the Poor*, 36 E. L. & E. 496; *Otis v. Jones*, 21 Wend. 394, 396; *Ehle v. Judson*, 24 Wend. 97; *Ingraham v. Gilbert*, 20 Barb. 151; *Eastwood v. Kenyon*, 11 Ad. and El. 438; *Hertzog v. Hertzog*, 29 Penn. St. 465; *Lange v. Kaiser*, 34 Mich. 317.

The parties must be consenting bargainers personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct, act or sign. If not, no contract is shown. *Depperman v. Hubbersty*, 33 E. L. & E. 88; *Gerhard v. Bates*, 20 E.

L. & E. 129; *Williams v. Everett*, 14 East, 582, 597, 598; *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37; *Mellen v. Whipple*, 1 Gray, 317; *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; *Ashley v. Dixon*, 48 N. Y. 430; *Merrill v. Green*, 55 N. Y. 270; *Simson v. Brown*, 68 N. Y. 355; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; *Bank of Republic v. Millard*, 10 Wall. 152; *First National Bank of Washington v. Whitman*, 94 U. S. 343; *Starke v. Cheeseman*, 1 Ld. Raym. 538; *Keller v. Holderman*, 11 Mich. 248; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Cundy v. Lindsay*, 38 L. T. Rep. (N. S.) 573; *Hills v. Snell*, 104 Mass. 173, 177; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Sullivan v. Portland &c. R. R. Co.*, 94 U. S. 806. The privity essential to a contract must proceed from the will of the parties. There may be a privity by operation of law where no privity of contract exists. 4 Bouvier's Inst., No. 4237.

Before leaving this part of the discussion it will be useful to quote somewhat liberally from the instructive opinion of Mr. Justice LOWRIE, in *Hertzog v. Hertzog supra*. After a citation from 2 Blackstone's Comm. 443, the opinion proceeds.

"There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this. But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

"It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction.

"The latter class are merely *constructive* contracts, whilst the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is

a fact legitimately inferred. *In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.* We have, therefore, in law three classes of relations called contracts.

“First. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

“Second. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

“Third. Express contracts, already sufficiently distinguished.”

Further on it is also observed that “every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not.”

We may now turn to the statute under which the liability sought to be set off arose and on which it depends. It is part of the first section of the act and provides “that if any person or persons shall put, or cause to be put, into any navigable river, creek or stream of this State, any logs, timber or lumber, for the purpose of floating the same to the place of manufacture or market and shall not make adequate provisions, and put on sufficient force for breaking jams of such logs, timber or lumber, in or upon such river, creek or stream, or for running or driving the same, or clearing the banks of such river, creek or stream of the same, and shall thereby obstruct the floating or navigation of such river, creek or stream, it shall be lawful for any other person, company or corporation, floating or running logs, timber or lumber in such river, creek or stream so obstructed, to cause such jams to be broken, and such logs, timber or lumber to be run, driven and cleared from the banks of such river, creek or stream, at the cost and expense of the person or persons owning such logs, timber or lumber, and such owner shall be liable to such person, company or corporation for such cost and expense.” Laws of 1863, p. 374.

Now the liability or cause of action here ordained and described is not to arise on contract,—is not to spring from any compact or privity of agreement or any coming together of the parties under any contract relation, or on the footing or in any view of any agreement. The owner of the logs is to become liable without any regard to his will or his assent to the acts and things for which he must pay. His accession to the transaction is not contemplated. He is to become debtor to a party with whom he has never had any contract relation whatever. The statute simply imposes the duty to pay for services which, without the provision, would, as being services purely voluntary, be not recoverable in any way or form.

No case is presented to raise an inference or cause an implication that there was a contract. The demand arises upon statute, that is, upon a duty which the statute originates, and has no place in the law of contracts. The liability belongs to that class Mr. Justice LOWRIE calls "constructive contracts," and which the civilians denominate "*quasi contracts*," meaning transactions in which the parties make no agreement whatever, but on which the law grounds specific obligations. Poth. on Obligations, Pt. I., ch. 1, sec. 2.

If the demand set up in this case should be considered as arising on contract within the meaning of the set-off law it will be very difficult to draw the line.

The conclusion on this part of the case is that they did not so arise and hence were not lawful matters of set-off. In regard to set-off the right is tied down by the statute to demands arising on contract, but assumpsit is not so confined, but is allowed an expansive application to cases which do not arise on contract.

The other Justices concurred.¹

GORDON v. BRUNER.

SUPREME COURT OF MISSOURI, 1872.

[49 *Missouri*, 570.]

BLISS, Judge, delivered the opinion of the court.

In an action upon a promissory note for \$1,000, the defendant, by way of counterclaim, sought to set-off or recoup the value of a crop of corn taken by the plaintiff from his farm. It appears that the plaintiff conveyed the farm to the defendant without reserving the growing crops, and afterward harvested a crop of corn without his consent. It also appears that plaintiff is a non-resident, and unless the defendant can recover in this manner he is without present remedy.

Under the statutory term "counter-claim" is included what was before known as a matter of set-off and recoupment, and it is admitted that damages for a trespass cannot be set off against a contract. Our statute in regard to counter-claims makes no change in this regard in the law as it existed before. Hence, unless the liability for taking

¹But see, *Allen v. U. S.* (1872) 17 Wall. 207; *Rothschild v. Mack* (1889) 115 N. Y. 1; *El Paso Nat. Bank v. Fuchs* (1896) 89 Tex. 197; *Gould v. Baker* (1896) 12 Tex. Civil App. 669; *Fanson v. Linsley* (1878) 20 Kas. 235; *Rail Road Co. v. Phelps* (1896) 4 Kas. App. 139; *Challiss v. Wylie* (1886) 35 Kas. 506; *Andrews v. Artisans' Bank* (1863) 26 N. Y. 298; *Eversole v. Moore* (1867) 3 Bush 49.—Ed.

the corn can be treated as arising on contract, the defendant cannot avail himself of it as a set-off proper.

It is, I believe, not disputed that when there is a conversion of personal property, and that property has been sold and converted into money, the owner may ratify the sale by suing the wrongdoer as for money had and received for his use. But where the property has not been sold but still remains in the hands of the wrongdoer, there is difference of opinion, and there have been conflicting decisions upon the question whether the owner may waive the tort and sue as for goods sold and delivered.

—In Massachusetts, in *Jones v. Hoar*, 5 Pick. 285, to which there is a note to a former opinion, reviewing the English cases, it was held that no contract could be implied unless the goods were sold and converted into money; and the same doctrine was held in Pennsylvania in *Willet v. Willett*, 3 Watts, 277, and in *Morrison v. Rogers*, 2 Ill. 317. But such has not been the uniform ruling. In *Putman v. Wise*, 1 Hill. N. Y., the court holds (p. 240) that “according to the well-known right of election in such cases, the plaintiffs might have brought *assumpsit* as for goods sold and delivered against those who had tortiously taken their property.” To this the reporter, Mr. Hill, adds a note reviewing the cases, and disapproves the doctrine of *Jones v. Hoar*. See *Hill v. Davis*, 3 N. H. 384; *Stockell v. Watkins’ Adm’r*, 2 Gill & J. 326, there cited.

The question was early brought before this court, and it was distinctly held that the owner of personal property may bring an action as upon contract against a *tortfeasor*. *Floyd v. Wiley*, 1 Mo. 430. “It does not lie in the mouth of defendant,” says the court, “to say that he is a trespasser.” The same case was again heard (*id.* 643), and the doctrine affirmed by it was also acknowledged in *Johnson v. Strader*, 3 Mo. 359.

It may be treated, then, as the doctrine in this State, that one who has converted to his own use the personal property of another, when sued for the value of that property as sold to him, will not be permitted to say in defence that he obtained it wrongfully.

The distinction between set-off and recoupment is now important only from the fact that the former must arise from contract, and can only be used in actions founded upon contract; while the latter may spring from a wrong, provided it arose out of the transaction set forth in the petition, or was connected with the subject of the action. The answer may be somewhat ambiguous as to whether the pleader intended to set up his claim as a set-off or by way of recoupment. If the former, it should have alleged a sale of the corn; and though the defendant might deny the sale and ownership of the plaintiff, he could not defend by showing that he was a *tortfeasor*. If the latter, it should show that the act complained of was “connected with the subject of the action;” and although before the adoption of the code

it could only go to reduce the amount of the claim, a defendant now may recover any balance found to be his due, as well by recoupment as set-off. *Hay v. Short*, *ante*, 149.

In *Grand Lodge v. Knox*, 20 Mo. 433, it is held that one who is sued for the purchase-money of land may recoup damages arising from the removal of fixtures by the seller. The defendant charges that the note sued on was given for the purchase-money of land, that the growing crop passed the deed, and that the plaintiff, without his consent, removed the crop, and he seeks to recover the value of the crop so removed. We think he is entitled to do so by way of recoupment, and even if the answer were ambiguous, it should not have been stricken out, but made more definite. For the error of the court in striking it out, the judgment should be reversed.

I see no necessity for the application made to the equity side of the court, and the questions raised by such application will not be considered. The cause will be remanded for trial under the counterclaim. The other judges concur.¹

FIRST NATIONAL BANK OF NASHUA *v.* VAN VOORIS.

SUPREME COURT OF SOUTH DAKOTA, 1895.

[6 *South Dakota*, 548.]

KELLAM, J. This is an appeal from an order of the circuit court of Brookings county discharging an attachment. The leading question in the case is whether, within the meaning of our attachment law, a judgment of a sister state is a contract, without regard to the character of the original cause of action which entered into it. The difficulty is not to find direct adjudications upon the general question of whether a judgment is or ought to be classed as a contract, for they are almost numberless on both sides of the question. The embarrassment is to determine which line of these cases, so squarely opposed to each other, is most securely grounded upon good reason, and most likely to result in its practical application in the most good and the least harm. Although some elementary law writers, and some courts whose learning is so great and whose judgment is so nearly infallible as to almost foreclose further inquiry, have declared judgments to be contracts, and have so classed them, it is very obvious that ordinarily they lack the element of consent, which is generally named as the very

¹A later decision of the same court, *Sandeen v. Kansas City, etc. R. R. Co.* (1883) 79 Mo. 278, refused to allow assumpsit where the goods had not actually been sold.

See *Starr Cash Co. v. Reinhardt* (1892) 20 N. Y. Supp. 872, *post.*—Ed.

life and spirit of a contract. It would look pedantic, and probably serve no useful purpose, to undertake in this opinion to rewrite the learning found in the opinions of other courts, and in the books of the text writers, upon this question of the contract character of a judgment. A very brief examination of the subject demonstrates the fact that the most learned, careful and thoughtful judges and lawyers have reached directly opposite conclusions. In Black on Judgments (volume 1 sec. 7 *et seq.*) are marshaled a large number of these conflicting decisions. In *Louisiana v. Mayor, etc.*, of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, the judges of the federal supreme court could not agree that a judgment was or was not a contract. It seems to me, however, that, even if a judgment is not a contract in a broad and unqualified sense, it does not necessarily follow that a foreign judgment cannot be the basis of an attachment. This must depend upon the interpretation to be given to the expression, "action arising on contract," as used in the attachment law. The original office of the attachment was to secure the collection of debts. The relation of debtor and creditor must exist. It could not be used in actions for wrongs or torts. In some of the states this scope of the proceeding has been enlarged so as to include in some states specified, and in others all, actions in tort. Actions at law are fundamentally and logically divided into two classes,—*"actions ex contractu"* and *"actions ex delicto,"*—though these express terms are not employed in the statute. Everybody knows what these terms mean, and, while the legislature seemed to prefer English words, we are inclined to think that they used this expression, *"actions arising on contract,"* as the equivalent of *"actions ex contractu."* just as they substituted "claim and delivery" for "replevin." Now, while it may seem essentially contradictory to say that an action brought on something which is not a contract is an action *ex contractu*, or an "action arising on contract," still what we seek is to know what kind of an action the legislature meant when they referred in their attachment law to an "action arising on contract." It seems to us that the thought and purpose of this first paragraph of the attachment law was to declare in what general class of actions an attachment would lie. It was a declaration of the purpose and policy of the attachment law of this state as to what general class or kind of actions might be aided by attachment. By the statutes of some of the states, attachments were allowed in any action for the recovery of money. Sometimes both classes were expressly named, as in Georgia, where it was available "in all cases of money demands, whether arising *ex contractu* or *ex delicto*." In others the remedy was confined to actions "on contract, express or implied;" "actions on contract;" "actions arising on contracts," etc.—all meaning, as we think, that general class of actions known in legal nomenclature as *"actions ex contractu."* Subsequent provisions are supplementary, and define particularly the further conditions that must exist to justify

the issue of the attachment. The general condition announced in the beginning is that the action must be of that class known as "actions on contracts" as distinguished from "actions for torts." Actions on judgments form a very common class of actions, and have always been brought as *ex contractu* actions, and not as tort or *ex delicto* actions. *O'Brien v. Young*, 95 N. Y. 431; *Louisiana v. Mayor*, etc., of New Orleans, *supra*; *Johnson v. Butler*, 2 Iowa, 535. This is not because judgments are essentially and absolutely contracts, but because the obligation imposed by them is more in the nature of a contract liability than a tort liability. It seems much the same in character as the liability of an infant to pay for necessities. The judgment against him does not rest upon his contract liability, for he is not required to pay what he promised or agreed to pay, but simply what it is right for him to pay, and yet his liability is regarded and classed as contractual.

We are inclined to regard a judgment, not as a contract, but as a quasi contract, which the legislature and the courts have treated as a contract in respect to the remedy by subsequent action upon it; and so, as before suggested, the question whether, under our statute, an attachment may issue in an action on a judgment depends upon the sense in which the legislature used the expression, "action arising on contract." If used in an exact and literal sense, an action on a judgment would not, in our opinion, be included; but if used in a general and leading sense, to distinguish actions of one class from those of the other, then the expression must be presumed to have been used in view of the common understanding and practice that actions on judgments were actions on contract. I think the same meaning was intended here, as by the same words in section 4915, providing that a cause of action "arising on contract" may be pleaded as a counterclaim. I think there could be little doubt that an existing judgment might under this provision be pleaded as a counterclaim. This point was directly ruled in *Taylor v. Root*, 43 N. Y. 335, where it was held that in an action on contract, a judgment in an action of slander could be set up as a counterclaim for the reason that, within the meaning of that provision, it was a cause of action arising on contract. In *Wyman v. Mitchell*, 1 Cow. 316, and *McCoun v. Railroad Co.*, 50 N. Y. 176, and *O'Brian v. Young*, 95 N. Y. 428, all New York cases, it was distinctly said that a judgment was not a contract; and yet in *Nazro v. Oil Co.*, 36 Hun. 296, and again in *Gutta-Percha & Rubber Manuf'g Co. v. Mayor*, etc., 108 N. Y. 276, 15 N. E. 402, reversing 46 Hun. 237, it was held that an action on a judgment was one on "a contract express or implied," within the meaning of the attachment law, and the right to attachment was in each case sustained. In the latter case the court said: "In a suit upon a binding judgment, whether foreign or domestic, the plaintiff must therefore be entitled to the same provisional remedies to which he would be entitled in an

action upon a contract express or implied." Upon the same line the supreme court of North Carolina said that, while judgments were not treated as contracts for all purposes, they were so treated for the purpose of distinguishing them from causes of action *ex delicto*, and that they were not included in a statute covering causes of action "not arising out of contract." See *Moore v. Nowell*, 94 N. C. 265. In *Johnson v. Butler*, 2 Iowa, 353, an attachment was issued on an action on a judgment. Their attachment law prescribes a different procedure in an action "founded on contract" from that in an action "not founded on contract." The question was as to which class the action belonged. The court said: "The distinction is manifestly between actions *ex contractu* and *ex delicto*, and it was always so understood and so acted upon. * * * The Code does not recognize the common-law technical names of action, nor, in this case, even the general classification of those upon contract and those of tort, in express and technical terms; still the sense cannot be mistaken." The Wisconsin supreme court in *Childs v. Manufacturing Co.* (Wis.) 32 N. W. 43, discussed the question whether an action on a judgment, as one arising on "contract expressed or implied," could be joined with an action for the breach of an express contract, and said: "When we consider the object of section 2647, we think it very clear that the legislature intended to use the word 'contract' in said subdivision in its largest sense, and not in a restricted sense. The object of the section, as a whole, is to classify causes of action with reference to their joinder in one and the same action. * * * In this view of the subject, notwithstanding the fact that in other parts of the statute, and for other purposes, the legislature seems to have made a distinction between 'contracts' and 'judgments,' that fact furnishes no good reason for holding that in said section 2647 the word contract was not intended to be used in its larger meaning, so as to cover a case of a judgment for the payment of money." Against this enlarged interpretation of the expression "actions arising on contract," so as to include an action on a judgment, it is urged that the legislature of at least one of the states, Nebraska, did not so use or understand it, for they thought it necessary to expressly add "judgment or decree" to "debt or demand arising upon contract." There is certainly some force in this, but the argument is of the same character as it would be to urge that under our law an attachment would lie in an action for a breach of promise to marry, because in New York it was thought necessary to except such actions from those on "contract, express or implied;" and our legislature has not made such exception, thus indicating, as the argument would be, that they intended to allow attachments in such cases. We do not think the fact in either case or the inference therefrom, is potent enough to control our conclusion as to the proper interpretation of our law. ~~While the question is not entirely free from embarrassment,~~ we conclude that an action on a judgment is an "action arising

on contract," within the meaning of that expression as used in our attachment law, and that this is so whether the original cause of action which entered into the judgment was one on contract or tort. This view necessitates the conclusion that the court erred in discharging the attachment on the ground that the action was not one arising on contract, and the order appealed from is reversed. All the judges concur.¹

THE PEOPLE *ex rel.* CHARLES DUSENBURY, APPELLANT *v.*
GILBERT M. SPEIR AS JUSTICE, ETC., RESPONDENT.

COURT OF APPEALS OF NEW YORK, 1879.

[77 *New York Reports*, 144.]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming upon *certiorari*, proceedings under the non-imprisonment act (chapter 300, Laws of 1831), by and before defendant as justice of the Supreme [Superior] Court, which resulted in the issuing of a warrant for the arrest of the relator.

The facts appear sufficiently in the opinion.

DANFORTH, J. In the course of supplementary proceedings instituted by judgment and execution creditors of Selah Hiler, William S. Kiely was appointed receiver of the property, etc., of the judgment debtor, and as such commenced an action in the Superior Court of the city of New York, against Selah Hiler, Charles Dusenbury, George W. Lane, as chamberlain of the city of New York, and others. It appears from the complaint that at the time of his appointment there was an action pending in favor of Hiler against certain parties, in which a considerable sum of money had been obtained and placed in

¹Where a statute provides for attachment in actions on contracts express or implied, a difference of opinion exists as to whether it should issue in actions *quasi ex contractu*. On strict theory, under the analogy of the statutory interpretation applied to the statute of limitations, set-offs, counter-claims (see cases on these subjects, *supra*), and judgments, Black. Judgments, § 11, unless the statute expressly provides for quasi-contract actions, an attachment should not be permitted, and some jurisdictions so hold. *Babcock v. Briggs* (1877) 52 Cal. 502; *Piscataqua Bank v. Turnley* (1836) 1 Miles, 312.

But there seems to be a growing tendency among courts to grant an attachment in quasi-contract actions even under such statutes. *Farmers' Nat. Bank v. Fonda* (1887) 65 Mich. 533; *Elwell v. Martin* (1859) 32 Vt. 217; *Nethery v. Belden* (1889) 66 Miss. 490; *El Paso Nat. Bank v. Fuchs* (1896) 89 Tex. 197, approved and distinguished in *Gould v. Baker* (1896) 12 Tex. Civ. Ap. 669. And see, Drake, Attachments, c. II.—Ed.

the hands of Lane as chamberlain, to the credit of the action, and payment of the same to Hiler was forbidden by injunction; that afterwards Hiler, with the fraudulent intent of obtaining possession of the money, and preventing it from coming to the hands of his creditors, and with intent to violate the injunction order, claimed that the money had been previously assigned by him to Dusenbury, in trust for the benefit of certain creditors of Hiler; that Dusenbury, with knowledge of this injunction, induced Lane to pay the money to him as such trustee; that the assignment under which Dusenbury made the claim was fraudulent and void as against creditors, and the plaintiff as receiver; and the prayer was that the assignment be declared fraudulent and void, and the plaintiff have judgment against each defendant, payable out of the money received by him. Issue was joined, and the trial court found, and decided among other things, "that the defendants Hiler and Dusenbury, with the fraudulent intent and purpose of obtaining possession of said money, or of transferring and disposing of the same, and preventing it from coming to the hands of creditors, and with full knowledge of said injunction order, and with the intent to violate it, procured by fraud an order from the court, requiring the chamberlain to pay to Dusenbury as trustee the money so deposited with him. That it was so paid to him as trustee. That no assignment was in fact made to Dusenbury as trustee or otherwise; that he was not individually or as trustee entitled to it; that he wrongfully and fraudulently procured possession of the same, and judgment was entered as stated in the affidavit hereinafter referred to.

After the recovery of this judgment, the plaintiff upon the affidavit of his attorney, to which was attached a copy of the judgment roll in the action above referred to, applied to the respondent for a warrant for the arrest of the relator, under the provisions of the act of 1831 (chapter 300) "to abolish imprisonment for debt, and to punish fraudulent debtors." Upon the return of the warrant a hearing was had, and the relator discharged. The General Term of the Supreme Court reversed the determination of the magistrate, and upon a rehearing, the respondent, following the rulings of that court, convicted the relator, and he removed the proceedings to the Supreme Court, where they were affirmed, and from the order of that court the relator has appealed. The first question to be examined relates to the jurisdiction of the officer who issued the warrant. His authority in this case was not absolute. It depended upon the existence of certain facts. He was required by the statute from which he derived his authority to have proof of these facts, and the same statute declared that he should not issue a warrant without that proof, which is there prescribed, and thus made indispensable to the exercise of his authority. His jurisdiction, and its limitation depend upon the provisions of the act above referred to. Under those provisions, no person can lawfully

be arrested or imprisoned on any civil process, issuing out of any court of law, or on any execution issuing out of any court of equity in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract. (Section 1.) But in such cases it is made "lawful for the plaintiff" who shall have obtained judgment against such person, to apply to any judge of the court in which such suit is brought for a warrant to arrest the defendant therein. (Section 3.) Then follow these words of prohibition: "No such warrant shall issue, unless satisfactory evidence be adduced to him by the affidavit of the plaintiff, or of some other person, that there is a debt or demand due to the plaintiff from the defendant, amounting to more than fifty dollars, and specifying the nature and amount thereof, as near as may be, for which the defendant according to the provisions of this act cannot be arrested or imprisoned," and establishing one or more particulars, which are specified, but which do not become at present, material in this inquiry. We are thus met at the outset with the question, whether the judgment, for the enforcement of which these proceedings were instituted, was founded upon contract, or resulted from a suit, which had for its cause of action a claim for damages for the non-performance of a contract. And this inquiry must be answered from the affidavit presented to the judge, and on which he based his warrant. The affidavit states the recovery of a judgment against the relator, in favor of the plaintiff, William S. Kieley, as receiver, etc., of Selah Hiler, for \$3,627.91, but neither states the cause of action nor the nature of the indebtedness, nor that it was upon contract express or implied, nor any fact from which either of these conditions can be inferred. The affidavit however contains these words: "Deponent further says and charges, that he verily believes that the defendant Dusenbury neither had any title or right to the moneys received by him from the chamberlain of the city of New York, which is particularly mentioned in the judgment roll in which the judgment in favor of the plaintiff was recovered, and that he well knew that he had none, but that he obtained it in disobedience of the injunction restraining him from receiving the same, and by fraud and imposition on the Court of Common Pleas, which court made the order on which he obtained the money, and this statement is made upon the judgment roll in this action, and findings of fact contained in said judgment roll, and upon the documentary evidence put in evidence on the trial to obtain said judgment. Deponent further says the said judgment is wholly unpaid, and constitutes the foregoing indebtedness; and further says that for the said cause of action, the defendant by the first two sections of the act (above referred to) cannot be arrested or imprisoned, as deponent is advised and believes." The clause last cited states a mere inference of law,

and that not the verified inference of the affiant, but his belief merely of the truth of advice given him. It is not enough. *Latham v. Westervelt*, 26 Barb. 260; *Broadhead v. McConnell*, 3 Barb. 187. Every fact stated in the affidavit as to the cause of action, meagre as it is in facts, leads to an inference that there was no contract at the foundation of the action, nor any act or circumstance from which one could be inferred or implied. Indeed the facts charged indicate directly a cause of action resting in tort. That the defendant obtained the money without right or title, and that he well knew he had none, excludes the idea that he received it under a contract, and when we are told furthermore that he received the money in disobedience of an injunction order restraining him from receiving it, and then that he obtained it by fraud and imposition on the court, we perceive not only that there was no contract, but that there is no fact from which a contract can be implied, and that if the allegations are true, the cause of action was not one for which the defendant, according to the provisions of the statute, could not be arrested. Nor is there any fact stated in the judgment roll which aids or strengthens the affidavit. There is nothing in the complaint or findings to indicate that the cause of action was a contract express or implied, and upon the hearing before the respondent after the arrest of the defendant, he so held, saying: "In looking at the judgment roll it is plain that the warrant herein should not have been granted, for the defendant could have been arrested in that original action, and if so he cannot be prosecuted under "the act to abolish imprisonment for debt."

And the learned judge who delivered the opinion of the General Term upon the first review, 12 Hun, 70, says: "The complaint in the receiver's action neither set forth in terms, nor in any manner alluded to any contract existing between himself or the judgment debtor, and the defendant Dusenbury, either as a basis of the liability desired to be enforced and maintained, or otherwise," but upholds the jurisdiction of the judge upon the ground that "from the facts, imperfectly stated in the complaint as they were, it could readily be seen that an implied contract existed in law for the payment of the moneys received by the defendant Dusenbury, to the receiver, in case he had no right to receive and hold them upon the ground claimed by him." We cannot agree with the learned judge in this construction of the statute. On the contrary we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which if broken an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities

of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. Addison on Contracts, 22. And a somewhat similar distinction is recognized in the civil law, where it is said: "In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because without being contracts, they produce obligations in the same manner as actual contracts." 1 Poth. Ob. 113. And again at common law says Blackstone, 3 Bl. Com. 165: "If any one cheats me with false cards, or dice, or by false weights or measures, or by selling me one commodity for another, an action on the case lies against him for damages, upon the contract which the law implies that every transaction is fair and honest." So if money is stolen, its owner may sue the thief for conversion; doubtless he may sue him for money had and received to his use, but in either of these cases could it be claimed that the wrong-doer was within the protection of the act passed to abolish imprisonment for debt, or that the contract implied by law was the contract specified in the first section of that act? Surely not. And to that class the present case belongs. The court below expressly puts the obligation upon the mere authority of the law, and makes a contract "by force of natural equity." The learned judge says: "The law implied a promise to pay over, as the judgment directed that to be done." So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation, and permits the tort to be waived, but there is no contract. That can only come from a convention or agreement of two, not by the option or at the election of one. In the case before us there is not even an election, for the complaint states no contract, nor charges any assumption.

It is also claimed by the respondent's counsel that inasmuch as the judgment declares the assignment under which the defendant claimed the money in question to be void, therefore Dusenbury must be deemed to have fraudulently incurred the obligation for which the action was brought, but that position is subject to the objection before mentioned; in that the debt or obligation spoken of in the act of 1831 means a

contract resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for a wrong suffered.

That the debt or obligation was fraudulently incurred is one of the particulars which, proved to exist, permits the judge to issue the warrant; but it must be remembered that in an action for the recovery of a debt, no arrest can be had, and it is mere evasion to say the defendant violated the injunction; imposed upon the court; made a claim under a fictitious assignment; and so, having wrongfully obtained the money, he refuses to pay it over, but the law says he ought to, therefore he shall be deemed to have promised, hence you may sue on that assumpsit, but you cannot arrest because the non-imprisonment act says you shall not in an action on contract. Therefore you set out in an affidavit the very frauds in consequence of which the law implied the contract, and demand the arrest of the defendant. It is very clear that an action for wrongs to persons, or to their property; actions of trover or trespass, or replevin, are not within the section, for they do not arise on contract. The party wronged cannot by waiving the tort make a contract, and then resort to the fact which constituted the tort as a ground of arrest. *Fassett v. Tallmadge*, 37 Barb. 436, was an action similar to the one upon which these proceedings are based, to set aside a conveyance made by a debtor of the plaintiff to the defendant Tallmadge, on the ground that was fraudulent and void as to creditors; it was so held, and the defendant was ordered to pay to a receiver appointed by the court a sum of money for the property received by him. In considering whether he was liable to be imprisoned, the court say: "The first section of the act to abolish imprisonment for debt, and the one hundred and seventy-ninth section of the Code, fourth subdivision, are expressly confined in their operation to cases of contract, or in which the debt is contracted, or an obligation is incurred. Neither of them apply to a case like the present, where the action is a proceeding in equity to set aside a conveyance or assignment of personal property."

As the complaint stated no cause of action upon contract, and as the affidavit presented to the judge contained no statement or assertion tending to establish a contract express or implied as the basis of the judgment, but on the contrary an action to recover the fund on the ground of its unlawful appropriation or conversion by the defendant, showing misfeasance or malfeasance on his part, rather than a contract liability, the case is not within the statute.

Many other questions are raised by the appellant's points, but as the conclusion to which we have arrived in regard to the one above mentioned goes to the foundation of the proceedings, it is unnecessary to discuss them.

The order of the General Term should be reversed, and the warrant of Judge SPEIR for the arrest of the relator, dated 14th of November,

1876, and all subsequent proceedings thereunder, vacated and set aside.

All concur, except MILLER, J., absent at argument.

*Ordered accordingly.*¹

U. S. v. Reid, U. S. Circuit Court (1883) 4 N. Y. C. P. 1, 3, WHEELER, J.:

Whether the execution could properly issue in such a case is to be determined by the laws of the State. U. S. Rev. Stat. §§ 990, 991; *Low v. Durfee*, 5 Fed. Rep. 256.

The law of the State directly applicable is found in the Code of Civil Procedure, section 549. That section allows process to issue against the body in actions:

"1. To recover a fine or penalty. . . .

"4. In an action upon contract, express or implied, other than a promise to marry; where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability," and in no other cases claimed to be applicable.

The object of the government is not to prevent imports, but to collect its revenue. The statutes which work this forfeiture are remedial to that end. This is the mode of obtaining the duties when the goods are so proceeded with as to become forfeited. The value of the goods forfeited, when recovered, is no more a penalty than the duties would be if paid. *Stockwell v. United States*, 13 Wall. (80 U. S.) 531; *In re Vetterlein*, 13 Blatch. (U. S. Cir. Ct.) 44. The execution cannot be upheld on the ground that the recovery was a penalty.

As to the other ground, this can hardly be said to be an action upon contract, either express or implied. Certainly there was no express contract. By force of the law, the property ceased to be the property of the defendants, and became the property of the government, if the government should choose to take it, and the government became entitled to the value of it in lieu of the property, and not by

¹Where a plaintiff waives the tort and sues by action in form *ex contractu* to recover money wrongfully converted to his own use by defendant, and the record shows that a tort has been actually committed, he is entitled, under the Illinois statute, to a *ca. sa.* or execution against the body of defendant, notwithstanding the form of action adopted. *Barney v. Chapman* (1884) 21 Fed. 903.

While the tendency is evident to subordinate the letter to the spirit of the law in matters of civil attachment, the relaxation should not extend to attachment of the person, inasmuch as statutes in restraint of personal liberty should be construed strictly and to the letter. It is therefore possible to support *First Nat'l Bank of Nashua v. Van Vooris* (1895) 6 S. D. 548 *ante*, and *People v. Speir*, *supra*, on theory as well as in practice.—ED.

virtue of any contract. The action of debt could be maintained, because of the title or right created by the law, and not by virtue of any obligation to pay entered into by the defendants, or to be implied from their acts beyond what rests upon everybody to obey the law and to yield to all its requirements. The liability to be incurred within the meaning of this part of the Code is a liability upon contract between party and party, and not the general compact between each member of society, and all the others to support the laws implied from living under them. These views were well supported by the reasoning of CHOATE, J., in *United States v. Moller*, 10 Ben. (U. S. District Court) 189.

Motion to set aside execution granted.

3. CONTRACT VERSUS QUASI-CONTRACT.

SCEVA *v.* TRUE.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1873.

[53 *New Hampshire*, 627.]

FOR the purpose of raising questions of law, and no other, the parties agreed that the facts are as stated in the following motions to dismiss, and the questions were reserved for the consideration of the whole court.

Assumpsit for the support of Fanny True under the circumstances which follow:

One Fanny True, an insane person, lived from 1822 until Nov., 1871, in the family of her brother-in-law, one Sceva by name. Fanny's father, William True, died in 1822, leaving a life interest in his real estate to his widow, and conveyed by deed, executed on same day with his will, an undivided one-half of his real estate to Fanny and her sister Martha. Said Sceva, the intestate, carried on said premises in 1822, married Martha in 1823, and lived on the premises so conveyed to the sisters from 1823 until a month prior to his death in 1871.

Said Sceva took the entire charge of the premises, used the crops and the proceeds of the lumber, wood, and bark, sold off of the whole farm for the common benefit of the family, and paid the taxes and other bills for the support and maintenance of the family. No administration was ever had upon any part of the estate of said William True, nor was there any use or trust for the benefit of said Fanny. No attempt was ever made to make any contract with said Fanny about her support,

or anything else. No application was made for the appointment of a guardian in the interest of said Enoch F. Sceva, because of the opposition of his wife to any step looking to that end. She has been supported during said forty years by said Sceva, his wife, and her mother, out of the avails of said real estate taken as aforesaid, and out of their own funds. Since 1844 her chief support has been from said Sceva. Said intestate was worth nothing when he commenced on said farm, and died worth about \$1,600.

Shirley, for the defendant.

The foundation principle of the entire law of contracts is, that the parties must have the capacity to contract, and must actually exercise their faculties by contracting. Here there was no capacity, for there was but one mind; no contract was made, and no attempt was made to make one. The two vital facts, without which no contract, tacit or express, can exist—capacity and its exercise—are wanting. Was there an implied contract? What does that term mean? In thousands of cases, in the books, we know just what it means. The parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting, but “acts which speak louder than words” may conclude him who denies a tacit contract. Aside from cases where the capacity to contract is wanting, no instance now occurs to us in which the implied contract cannot be supported upon these principles, and the familiar doctrines of waiver and estoppel. Our position is, that where there is no express contract, a jury may from circumstances infer one, but that this can in no case be done where the capacity to contract is wanting. This court has settled that there is a distinction between the cases of minors and lunatics. *Burke v. Allen*, 29 N. H. 117. The reasons are apparent. It is another fundamental principle, that no one, by voluntarily performing services for another, can make that other his debtor. If these principles apply to cases where the contracting mind is wanting, they settle this case. We know it is sometimes said, in such a case, “the law will imply a contract.” What does that mean? As it seems to us, only this: that where A, who has capacity to contract, furnishes B, who is totally destitute of such capacity, what is proper for B to have, the judges will turn the bench into a broker’s board, will substitute themselves for B, make a contract where none existed, cause it to relate back to the voluntary acts of A, and then sit in judgment upon and enforce their own contract. It is a perversion of language to call such a performance a contract of any kind. It is judicial usurpation. The Constitution gave the court no such power. The court has no power to make contracts for people: it can only infer one where a jury might.¹

Barnard for the plaintiff.

¹Counsel here cited a number of cases.—Ed.

LADD, J.¹ The other facts stated in the motion (which is to be regarded rather as an agreed case than a motion to dismiss) stand upon a different footing, inasmuch as they go to the merits of the case, and may be pleaded in bar or given in evidence under the general issue, and, when so pleaded or proved, their legal effect will be a matter upon which the court, at the trial, must pass. Some suggestions upon this part of the case may therefore be of use.

We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessities furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse, and afterwards sells it for cash: the law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise, that is, feigns a promise when there is none, to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties, from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury? The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical

¹Part of opinion is omitted relating to service upon an insane person.—Ed.

capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be as entirely wanting as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth a promise to pay. So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house, with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessities furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. See remark of SARGENT in *Ray v. Alden*, 50 N. H. 83, and authorities cited. So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. *Proprietors of Turnpike v. Taylor*, 6 N. H. 499. In the recent English case of *The Great Northern Railw. Co. v. Swaffield*, L. R. 9 Ex. 132,¹ the defendant sent a horse by the plaintiff's railway directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse: he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges, which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them.

Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either

¹See *post*, p. 233 for report of this case.—ED.

in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu*, or actions *ex delicto*. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term implied contract. In the discussion of any subject, there is always danger of spending breath and strength about mere words, as well as falling into error when the same term is used to designate two different things. If the term, implied contract, be used indifferently to denote (1) the fictitious creation of the law spoken of above; (2) a true or actual but *tacit* contract, that is, one where a meeting of the minds or mutual understanding is inferred as matter of fact from circumstances, no words written or verbal having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one,—it is not strange that confusion should result, and disputes arise where there is no difference of opinion as to the substance of the matter in controversy: whereas, were a different term applied to each, as, for example, that of legal duty to designate the first, contract, simply, to designate the second, and, contract by estoppel, the third, this difficulty would be avoided. It would of course come to the same thing, in substance, if the first were always called an implied contract, while the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would perhaps show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. See remarks of SMITH, J., in *Bixby v. Moore*, 51 N. H. 402, and authorities cited at page 404.

Much may doubtless be said against supplying a remedy for the enforcement of a plain legal right "by so rude a device as a legal fiction" (Maine, *Ancient Law*, 26)—but, at this time of day, that is a matter for the consideration of the legislature rather than the courts. The remedy of *indebitatus assumpsit* can hardly be abolished in that large class of cases where it can only be sustained by resorting to a fiction until some other is furnished to take its place.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessities furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question, the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid. Again: the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And, upon this point, the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support, and credited for the use and occupation of the land,—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support, are for the jury. *Munger v. Munger*; *Seavey v. Seavey*; *Bundy v. Hyde*. If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.¹

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court.

Case discharged.

¹Accord: *Hertzog v. Hertzog* (1857) 29 Pa. St. 465, an excellent case largely quoted in *Woods v. Ayres* (1878) 39 Mich. 345, printed *ante*.

In thorough accordance, both as to the facts and the law, is *In re Rhodes* (1890) L. R. 44 Ch. D. 94.—Ed.

Augner v. Mayor (1897) 14 Appellate Division (Supreme Court of New York) 466, BARTLETT, J., dissenting:

This action is upon what has been aptly termed a *quasi* contract. It is not upon a genuine contract, that is, an agreement, in fact, between plaintiff and defendant, either express or implied. It is simply upon a statutory liability, which is sufficient to sustain an action analogous to what was formerly called *assumpsit*. "That feature," as Judge ALLEN said, in *McCoun v. N. Y. C. & H. R. R. R. Co.*, 50 N. Y. 180, "does not suppose a contract, but simply a promise *ex parte*." In the classification of actions this is undoubtedly an action *ex contractu* and not *ex delicto*. But that does not settle the present question, which is, whether an action upon an obligation arising solely *ex lege*—though proceeding in form *ex contractu*—is contemplated by section 420 of the Code of Civil Procedure. There are many actions upon contract—actual even—which are not within this section. In fact the contracts, whether express or implied, which come within it are strictly limited. They are, *first*, an express contract to pay money fixed by its terms, or capable of being ascertained therefrom by computation only. That, certainly, is not this case. *Second*, an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to or for the use of the defendant or a third person. This case cannot come within the two latter alternatives. It has nothing to do with property delivered or services rendered. The claim is, that it comes within the earlier specification, namely, "to pay money received or disbursed." As there is no charge in the complaint of the disbursement of money, the point is reduced to its receipt. Does the complaint, then, aver the defendant's breach of an "implied contract to pay money received" by it? There is no other possible phase of the section which bears upon the question presented. The complaint certainly does not aver even an implied contract to pay money received "to, or for the use of" the defendant or a third person. It either alleges money received "*by*" the defendant, or it alleges nothing which is within the section. What, then, is the feature of the contract to which this language refers? Clearly, money received by the defendant *to the use of the plaintiff*, that is, money which, upon its receipt by the defendant, becomes due and payable to the plaintiff, and so becomes due and payable under some contract between them, either express or implied. This means a contract between the parties, an actual contract in fact, whether the promise to pay be direct or inferential. "An implied promise," to again quote Judge ALLEN in the case cited *supra*, "or contract is but an express promise proved by circumstantial evidence." It is clear that the codifier here was not dealing with legal fictions invented to sustain remedies *ex contractu* upon liabilities which rest upon naught save statutory mandate, pure and simple. The intention was to limit those cases where a plaintiff might

enter his judgment without the revisory consideration of the court to breaches of the few simple and actual contracts carefully enumerated in the section. In other Code instances we find no such limitation. For example, a warrant of attachment may issue in an action for the breach of any contract whatever, express or implied, except a contract to marry. Code, § 635. But the construction given to even this unlimited provision favors the view that the contract, express or implied, referred to in this latter section is a contract founded upon consent, that is, upon the actual meeting of minds; in other words, a contract between the parties in the ordinary and proper sense of this term, and not a mere legal fiction which forces a party to do something which he has never agreed to do. Thus, in *Remington Paper Company v. O'Dougherty*, 96 N. Y. 666, affg. 32 Hun, 255, it was held that an attachment under section 635 would not lie in an action brought under section 3247 of the Code to recover the costs of a former action which was prosecuted by the defendant in the name of a third person for her benefit. The presiding justice (SMITH) at General Term said that "the defendant has made no contract with the plaintiff or its assignors; she is liable only *by the provisions of the statute.*" A different view was subsequently taken by the Court of Appeals of an action upon a judgment (*The Gutta Percha & Rubber Mfg. Company v. Mayor*, 108 N. Y. 276), thus making a distinction—the point of which it is difficult to perceive—between the fiction of a promise founded upon a legislative mandate and that founded upon a judicial mandate. The same court had previously held that a judgment was not a contract within the meaning of an act reducing the rate of interest, but reserving from its operation "any contract or obligation" made prior to its passage. *O'Brien v. Young*, 95 N. Y. 428. It had also held in *The People ex rel. Dusenbury v. Speir*, 77 N. Y. 144 that the phrase "contract, express or implied," as used in the old Non-imprisonment Act (Laws of 1831, chap. 300), referred to a contract resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for the wrong. Judge DANFORTH said in that case that the implied contract referred to in the statute is one where "the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances;" and, whether express or thus implied, "must be the result of the free and *bona fide* exercise of the will producing the '*aggregatio mentium*,' the joining together of two minds, essential to a contract at common law." The learned judge added: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contracts. . . . Therefore, these facts are called

quasi contracts, because, without being contracts, they produce obligations in the same manner as actual contracts." The conclusion there was that the statute did not embrace obligations of the latter class. To the like effect are *Louisiana v. Mayor of New Orleans*, 109 U. S. 285 and *Steamship Company v. Joliffe*, 2 Wall. 450. The same point was directly involved in *Inhabitants of Milford v. Commonwealth*, 144 Mass. 64. The Superior Court was given jurisdiction by statute "of all claims against the Commonwealth which are founded in contract for the payment of money," and it was there held that this jurisdiction did not extend to an obligation imposed by law upon the Commonwealth to reimburse the expense incurred by a town in the support of a State pauper. FIELD, J., observed that "a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*."

In England these *quasi* contracts are no longer confused with "implied contracts." Lord Justice COTTON, in *Rhodes v. Rhodes*, 44 Ch. Div. 94, referring to the nature of the obligation incurred by a lunatic for necessaries supplied, declared that "the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic." "It is asked," observed that learned judge, "can there be an implied contract by a person who cannot himself contract in express terms?" The answer is that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities." See, also, *Trainer v. Trumbull*, 141 Mass. 527; *Cunningham v. Reardon*, 98 *id.* 538; *Read v. Legard*, 6 Exch. 636.

Thus it is apparent that the complaint nowhere alleges a breach of contract, express or implied, "to pay money received . . . by the defendant." The latter phrase undoubtedly means to pay money received by the defendant for the plaintiff, or to which the plaintiff, upon the receipt of such money by the defendant, was in justice entitled. It does not mean to repay to the plaintiff money received from him by the defendant for the defendant's own use, which, owing to circumstances subsequently occurring, the defendant is required to return. What the complaint here really alleges is a statutory obligation to restore to the plaintiff part of the money originally received by the defendant to its own use as statutory trustee for public charity; which part, in equity and justice, as decreed by the Legislature, should now be refunded to the plaintiff. That right of action does not depend at all upon the receipt of the license fee by the defendant. The statute gives it whether the board of excise did its duty or not; whether that board paid the fee into the city treasury or not; whether, if it did, the city has applied the fee to the specified charities or not. The right of action depends solely upon the two facts, *first*, the payment of the

license fee to the board; and, *second*, the statutory termination of the license. Laws of 1896, chap. 112, § 4.

Our conclusion is that this right of action is not upon a contract express or implied, within the meaning of that phrase as used in section 420 of the Code; that it is not, in fact, upon a contract at all, but upon the fiction of a promise implied by law from statutory compulsion; and that it certainly is not upon an implied contract to pay money received by the defendant.

It follows that the nature of the plaintiff's action was such that he could not take judgment without application to the court.

The order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and the motion for judgment granted, without costs.

Order affirmed, with ten dollars costs and disbursements.¹

¹It should be said in this connection that while the U. S. Court of Claims recognizes the distinction between express and implied, i. e., quasi-contracts, it does not limit its jurisdiction—based as it is by Act of Congress upon “contracts expressed or implied”—to express contracts or contracts implied in fact. As the Court is expressly forbidden to take jurisdiction of actions “sounding in tort,” it is reasonable, although rather unscientific, that the court should extend its jurisdiction to all forms of contract action so as to give the suitor a remedy against the Government. Or to quote from the Court: “With these questions of liability decided positively and negatively—against the Government and for the Government—through a course of many years, it seems to the Court that the primary subject of jurisdiction must now be regarded as well settled. There have been a few cases in the Supreme Court where the decision was against jurisdiction—cases requiring equitable remedies, or cases wherein the existence of a contract was negatived by peculiar facts and circumstances—and there have been many more cases where the decision was against liability on the part of the Government; but there has never been a case in form *ex contractu* [as distinguished from *ex delicto*] in which the liability of the Government has been maintained and the jurisdiction of the Court denied.” Per NOTT, C. J., in *Ingram v. U. S.* (1897) 32 Ct. Cl. 147, 169. This case, exhaustively argued and carefully considered, is in reality a short treatise on the sources, extent and nature of Quasi-Contract, and reference is made to it as a whole. Squarely contra is the case of *Milford v. Commonwealth* (1887) 144 Mass. 64.—ED.

SECTION II.

WHEREIN QUASI-CONTRACT DIFFERS FROM A TORT.

PERKINSON v. GILFORD AND OTHERS.

KING'S BENCH, 1640.

[Croke, Charles, 539.]

DEBT against Gilford and others, executors of William Collier, Esq., late sheriff of the county of Dorset, for two and twenty pounds ten shillings. Whereas the plaintiff had recovered in the Common Pleas against the executor of William Pawlett a debt of one hundred pounds, and two and twenty pounds ten shillings for damages, the debt and damages *de bonis testatoris, si, &c.; et si non*, the said two-and-twenty pounds ten shillings *de bonis propriis*; and the record being removed into this court, the plaintiff had a *fiery facias* directed to the said William Collier, sheriff of Dorset, for the levying of the said two-and-twenty pounds ten shillings damages of the goods of the said executor: and by virtue thereof he levied the said two-and-twenty pounds ten shillings, and afterwards died without paying, &c.; whereupon he demanded it of the said executors, and they had not paid it, *per quod actio accrevit*. The defendants pleaded *non debet*; and found against them.

THE FOURTH OBJECTION,¹ That although the action lies against the sheriff himself, yet it lies not against his executors; for the non-payment is a personal wrong, wherewith his executors are not chargeable, as debt upon an escape lies not against a sheriff's executors.

But BERKLEY, JONES, and myself (BRAMPSTON being absent) agreed, that the action well lies. And for the fourth objection they held, that the sheriff's executors are as well chargeable as himself: for, as JONES said, there is a diversity where the sheriff is chargeable in his life for a personal tort or misfeasance; there his person is only chargeable, and there *actio moritur cum persona*: but where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dies, his executors are chargeable as well as himself: which is the reason, that for an escape by the sheriff his executors are not chargeable: but there would be great mischief if the sheriff's executors should not be liable in this case: for the plaintiff had a duty due to him from the executors of Pawlett the first defendant, who paid it to the sheriff, and thereby was discharged thereof: and if the plaintiff should not recover it against the sheriff's executors, he should be without remedy, which the law will not suffer. Wherefore they all agreed, that the action well lay. And rule was given to have judgment entered, unless, &c.

¹Only so much of the case is given as relates to this objection.—ED.

ANONYMOUS.

TRINITY TERM, KING'S BENCH, 1700.

[12 *Modern*, 415.]

HOLT, Chief Justice. Trover lies for the master for a ticket or other writing entitling his apprentice to money earned by him during the apprenticeship.¹

But here the trover was against the executor of the apprentice for a ticket given out after the death of the apprentice, for money earned by him during the apprenticeship; and because it never was in the apprentice's possession, the action was not maintainable; but after the executor receives the money, the master may have *assumpsit* for so much money received to his use.

BISHOP OF WINCHESTER v. KNIGHT.

HIGH COURT OF CHANCERY, 1717.

[1 *Peere Williams*, 406.]

ONE held customary lands of the Bishop of *Winchester*, as of his manor of *Taunton-Dean* in *Somersetshire*, in which lands there was a copper-mine that was opened by the tenant, who dug thereout, and sold great quantities of copper ore, and died, and his heir continued digging and disposing of great quantities of copper ore out of the said mine.

Lord Chancellor [COWPER]. It would be a reproach to equity, to say, where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case, I must be without remedy.

It is true, as to the trespass of breaking up meadow, or ancient pasture-ground, it dies with the person; but as to the property of the ore or timber, it would be clear even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it; but it is stronger in this case, by reason that the tenant is a sort of a fiduciary to the Lord, and it is a breach of the trust which the law reposes in the tenant, for him to take away the property of the Lord; so that I am clear of opinion, the executor in such case, is answerable.

¹See *Barber v. Dennis*, Salk. 68; *Hill v. Allen*, Vezey, 83; 1 Burn's Justice, 17th ed. 90.—Reporter's note.—Ed.

As to the evidence that the tenant might do one sort of waste, as to cut down and dispose of the timber, this might be by special grant; but it is no evidence that the tenant has a power to commit any other sort of waste, (*viz.*) waste of a different species, as that of disposing of minerals; but a custom empowering the tenants to dispose of one sort of mineral, as coals, may be an evidence of their right to dispose of another sort of mineral, as lead out of a mine.

But this question being doubtful, and at law, let the Bishop bring his action of *trover* as to the ore dug and disposed of by the present tenant.

HAMBLY AND ANOTHER, ASSIGNEES OF MOON v. TROTT,
ADMINISTRATOR.

HILARY. KING'S BENCH, 1776.

[*Cowper*, 371.]

IN *trover* against an administrator *cum testamento annexo*, the declaration laid the conversion by the testator in his lifetime. Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. *Kerby* had moved in arrest of judgment upon the ground of this being a personal tort, which dies with the person; upon the authority of *Collins v. Fennerell*, Trin. 22, 23, Geo. 2, B. R., and had a rule to shew cause.

Mr. *Buller* last term shewed cause.—The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says, *actio personalis moritur cum persona*. But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither debt nor assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this; where the action is founded merely upon an injury done to the person, and no property is in question, there the action dies with the person, as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Trover is not like trespass, but lies in a variety of cases where a party gets the possession of goods lawfully. It is founded solely in property, and the value of the goods only can be recovered. Therefore, the damages are as certain as in any action of assumpsit. As to the case of *Collins v. Fennerell*, it is a single authority and was not argued; therefore, most probably was determined simply on the old maxim. But *Savile* 40, case 90, is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover

property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cyder converted by injustice to the use of the person deceased; therefore, this action does not die with the person.

Mr. *Kerby contra* for the defendant cited *Carter v. Fossett*, Palm. 330, where JONES, Justice, said, "that when the act of the testator includes a tort, it does not extend to the executor; but being personal dies with him; as trover and conversion does not lie against an executor for trover *fait par lui*." Collins v. Fennerell, above cited.

Here, the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of tort, and conversion is the gist of the action. No one is answerable for a tort but he who commits it; consequently this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testator. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained by an executor but not against him. *Hughes v. Robotham*; *Le Mason v. Dixon*, Popham, 31.

Lord MANSFIELD. If this case depends upon the rule, *actio personalis moritur cum persona*, at present only a *dictum* has been cited in support of the argument. Trover is in form of a tort, but in substance an action to try property.

Mr. *Kerby*. The executor is answerable for all contracts of the testator, but not for torts.

Lord MANSFIELD. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, etc., in question; in that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON, Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHURST, Justice. The maxim does not hold as a universal propo-

sition, because assumpsit lies. As to the case of *Collins v. Fennerell*, all the court considered it as unargued, and given up rather prematurely by Mr. *Henley*.

LORD MANSFIELD. The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 Keb. 502; Vent. 30; Sir T. Raym. 95. The court ordered it to stand over.

Upon a second argument this day, Mr. *Dunning* cited Cro. Car. 540; 1 Sid. 88.

LORD MANSFIELD. Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

ASTON, Justice. The rule is, *quod oritur ex delicto, non ex contractu* shall not charge an executor. Bac. Abr. 444, 445. tit. Executors and administrators. 2 Bac. Abr. 280, tit. Trover. Where goods come to the hands of the executor in specie, trover will lie; where in value, an action for money had and received. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on Monday, February 12th, in this term. LORD MANSFIELD delivered the unanimous opinion of the court as follows:—

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his lifetime; the plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or administrator is not liable to answer.

The maxim, *actio personalis moritur cum persona*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant, if no other action could be brought against the executor, it seems unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration. We have carefully looked into all the cases upon the subject. To state and

go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the cause of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the form of action.

As to the first; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises ex delicto, as is said in Hole v. Blandford, Sir T. Raym. 57, supposed to be by force and against the King's peace, there the action dies,—as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases where trover lies against the testator, another action might be brought against the executor which would answer the purpose. . An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore, it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.¹

"Let us now suppose the case of a person who takes possession of and uses another's horse, wagon and team, or threshing machine, without his knowledge, consent, or authority. In such a case, the law provides common law remedies, in which the defendant is afforded the constitutional right of a trial by jury. In such a case, the owner may recover damages in trespass for the tort, or he may waive the tort, and sue in assumpsit on the implied promise to pay what is equitably due for the use and possession of the property," per HUGHES, J., in *Sayles v. Richmond, Fredericksburg & Potomac R. R. Co.* (1879) 4 Ban. & A. 239, 245.

In the interesting case of *Stockett v. Watkins* (1830) 2 G. & J. 326, it was

There is a case in Sir Thomas Raymond, 71 (*Bailey v. Birtles et uxor*, executrix of Richard Bailey), which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, "that he was possessed of a cow, which he delivered to the testator, Richard Bailey, in his lifetime, to keep the same for the use of him, the plaintiff; which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use; and that neither the said Richard in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a misfeasance, yet for a non-feasance he is; as for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539; 9 Co. 50 b, where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*. But notwithstanding this the court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Saville 40, a difference taken." That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, MANWOOD, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to this testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the

held that where negroes tortiously possessed were returned to the owner, the latter might waive the tort and recover the value for their time in assumpsit. As this was a case of Administrator against Administrator, it would seem that Lord MANSFIELD'S dictum is not without adjudged support. See also *McSorley v. Faulkner* (1892) 18 N. Y. Supp. 460.—Ed.

offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities that trover and conversion does not lie against the executor; I mean, where the conversion is by the testator. Sir William Jones, 173, 174, Palm. 330. There is no saying that it does.

The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff, upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

*Judgment arrested.*¹

¹In *Kirk v. Todd* (1882) L. R. 21 Ch. D. 484, 488, action was begun against one Todd, who died, and more than six months thereafter the action was continued against his executors.

Sir George JESSELL, M. R.: "I cannot help feeling that this is a very hard case, and that no doubt is the reason why the appeal was brought, but we must not allow hard cases to make bad law. The plaintiffs sued the original defendant for damages and an injunction. It was an action on a simple tort. It did not appear that the defendant had got any benefit by fouling the plaintiff's stream; he had only injured the plaintiff. As I understand the rule at common law, it was this—you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. 4, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity."

But if the tortfeasor sustain a fiduciary relation, courts of equity allow the action to survive against the estate.

In *Warren v. Para Rubber Shoe Co.* (1896) 166 Mass. 197, 104, it is said: "We may assume that the injury to the corporation and the benefit to the estate of Coolidge were too indirect to furnish of themselves a reason for the survival of the remedy, *Read v. Hatch*, 19 Pick. 47; *Cutting v. Tower*, 14 Gray, 183; *Cummings v. Bird*, 115 Mass. 346; *Leggate v. Moulton*, 115 Mass. 552; *Cutter v. Hamlen*, 147 Mass. 471; *Phillips v. Homfray*, 24 Ch. D. 439, 454, 463; *Finlay v. Chirney*, 20 Q. B. D. 494. But where a relation has existed which involved the performance of certain duties for pay, and especially where that relation was of a fiduciary character and there was a failure to perform those duties, the remedy has been held to survive. The decision most closely in point of any which has come to our notice is *Concha v. Murrieta*, 40 Ch. D. 543. But this exception to the application of the maxim, *Actio personalis moritur cum persona*, has often been stated. *Batthyany v. Walford*,

OSBORN v. BELL.

SUPREME COURT OF NEW YORK, 1848.

[5 Denio, 370.¹]

ASSUMPSIT, tried at the Rensselaer circuit in November, 1844, before PARKER, Cir. J. The suit was originally commenced in January, 1843, by the plaintiff's intestate, but he dying after issue joined, the present plaintiff was appointed his administratrix, and by an order of the court was substituted as plaintiff. The declaration contained the general counts in *indebitatus assumpsit* for goods sold, and money had and received. Plea, *non-assumpsit*. The plaintiff claimed to recover for certain factory machinery, namely, a lathe and two bat carders.

By the Court, BEARDSLEY, Ch. J. Assuming that the lathe and bat carders, when levied on by the defendant, were the property of G. K. Osborn, an action of trespass, if the taking was tortious, would have been an appropriate remedy for him while living, and after his decease a similar action might have been brought by the plaintiff as administratrix. The last proposition was not true at common law, the maxim being *actio personalis moritur cum persona* (1 Ch. Pl. 78, 9, ed. 1837; Broom's Legal Max. 400); but the statute is explicit that trespass may, in such case, be brought by the personal representative.

36 Ch. D. 269, 279-281; Phillips v. Homfray, 24 Ch. D. 439, 465; Morgan v. Ravey, 6 H. & N. 265; Sollars v. Lawrence, Willes, 413, 421."

In the case alluded to in the passage quoted, Concha v. Murrieta (1889) L. R. 40 Ch. D. 543, 553, it is said: "It was urged upon us that to allow this claim would be contrary to the maxim of the English law, '*Actio personalis moritur cum persona*.' It is true that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite different where the act is not a mere tort, but is a breach of a quasi contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty. Here the father, though I do not call him a trustee, was in a position in which he owed duties of a fiduciary character to his daughter. In the very careful judgment of Lord Justice BOWEN, in Phillips v. Homfray, 24 Ch. D. 439, cases depending on breach of contract, express or implied, are excepted from the judgment. Here there is what we call quasi contract, the law implying a contract that a man will faithfully perform the duties which he has undertaken. Juan José Concha undertook a duty in consequence of his position, and losses arising from his breach of it can be followed up against his estate." And see further Houghton v. Butler (1896) 166 Mass. 547; Parker v. Simpson (1902) 180 Mass. 334, 343.

For a case of a quasi-contractual duty arising from a position not unlike that in Concha v. Murrieta, *supra*, and for the effect of the statute of limitations upon such duty, see Wilson v. Towle (1848) 19 N. H. 244, *ante*.—Ed.

¹S. C. 49 Am. Dec. 275, with note.—Ed.

2 R. S. 114, § 4. The present, however, is not an action of trespass, but assumpsit, and if that remedy existed in favor of the intestate there can be no doubt it survived to the present plaintiff as administratrix.

The declaration contained general counts for goods sold and money had and received. and it appeared on the trial that the defendant, who was a collector of taxes, had seized and sold the property in question to satisfy certain taxes which it was his duty to collect. It was not shown that the defendant received any money on the sale; nor was the right to maintain this action placed on the ground that the plaintiff might waive the tort and bring assumpsit for the money thus received by the defendant. The general rule, where property has been wrongfully taken and converted into money, certainly is, that the owner of the property may waive the tort and bring his action directly for the money received by the wrongdoer, and the case of Young v. Marshall, 8 Bing. 43, is a strong authority for the position that this may be done, under some circumstances, where the property was taken and sold by a public officer in the supposed performance of his duty, the money having been paid to and received by him in that character and capacity. It is not unlikely that the money bid on the sale of this property was paid to the defendant as collector, and, in that event, he also, probably, paid over the whole or some part thereof in satisfaction of the tax for which the sale had been made. If this action had been brought for the money so received by the defendant, as collector, the fact that he had notice, before the money was paid over, of the claim of the intestate to the property sold, might have been indispensable in order to show a right of action for the money. But in all these respects this bill of exceptions is deficient: it does not show that the defendant received or paid over any money, or that he ever heard of the claim of the intestate, until this action was brought. The case then, so far as respects a right to recover for money had and received, is but partially presented, and that question not being formally made on the trial, will be dismissed without the expression of any opinion upon it.

The judge charged "that the action for goods sold was well brought in this case" to which an exception was taken by the defendant, and this presents the point to be considered.

There was no pretence on the trial or the argument, that the defendant ever, in fact, made a purchase of these goods, or expressly agreed to pay for them. He was a collector of taxes, and as such seized and sold the goods to satisfy a tax in his hands for collection. As to the intestate, what was done may have been wrongful, but there was nothing like a purchase, in fact, of the goods by the defendant. He was not acting in a personal and private capacity, but as a public officer; and although what he did may have been, as to the intestate, wholly unauthorized, it was done for the public and not for the benefit and advantage of the defendant. The question then arises, can a person, whose goods are wrongfully taken by a public officer, acting

as such and not for his own benefit, waive the tort and maintain assumpsit for goods sold?

It is entirely settled that where goods are wrongfully taken and converted into money by a person *acting for his own benefit*, the owner may waive the tort and bring assumpsit for the money thus received by the wrongdoer. Chit. on Cont. 607, 23, 24, ed. 1842; 1 Arch. N. P. 3; 1 Hill, 240, note; 3 *id.* 283, note; 5 *id.* 584, note, and the authorities referred to in these books.

There are also respectable authorities for the position that where goods have thus been taken, but not turned into money, the owner may waive the tort, and recover as for goods sold. *Hill v. Davis*, 3 N. H. 384, and the books last above referred to. But upon this point the authorities are not agreed, some holding that the tort can only be waived where the property has been sold and converted into money by the wrongdoer, in which case the owner may affirm the sale and sue for the money as had and received to his use. *Jones v. Hoar*, 5 Pick. 285; *Willet v. Willet*, 3 Watts, 277; *Bennett v. Francis*, 2 B. & P. 554; see also the books above referred to. It is unnecessary in this case to say how that point should be determined, and no opinion is intended to be expressed upon it. If an action for goods sold will lie in any case, for a mere tortious taking, the goods not having been turned into money by the wrongdoer, it must be because the law will, in such case, imply a promise to pay for them; for assumpsit can only be maintained upon a promise, express or implied. Where the goods have been applied to the use of the wrongdoer, it may not be unreasonable, and certainly not unjust, to imply a promise to pay for them, without regard to the manner in which the goods were originally acquired. The wrongdoer is responsible in some form of action for their value, and he cannot be prejudiced by holding him as a purchaser and not a trespasser. In such case if the wrongdoer die before satisfaction made or a recovery had for the trespass, his personal representatives, although not answerable in tort for his wrongful acts, are still liable to the party injured for the value of the property. To this extent the property of the wrongdoer is, in such case, augmented by the wrong done; and, although the right to bring an action of trespass dies with the person of the trespasser, his representatives are, in such case, held liable in assumpsit for the value of the property, on the principle that the estate which received the benefit should, so far, repair the injury. *Hamblly v. Trott Cowp.* 372; *Cravath v. Plympton*, 13 Mass. 454; *Wilbout v. Gilmore*, 21 Pick. 252; *Powell v. Reese*, 7 A. & E. 426; *Foster v. Stewart*, 3 M. & S. 191. And it is upon this principle alone, as it seems to me, that a promise to pay for goods tortiously taken, can, in any case, be implied. It is clearly so where the action is brought against the personal representatives of a wrongdoer. In *Powell v. Reese*, just cited, Lord DENMAN said: "In the case of *Hambley v. Trott*, 1 Cowp. 372, Lord MANSFIELD very fully considers this subject,

and lays down the distinctions which arise as to the surviving of remedies, upon the cause of action, and the form of action. He observes, that there is 'a fundamental distinction.' If it be a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to the testator for the value or sale of the trees he shall."

In *Cravath v. Plympton* (*supra*), PUTMAN, J., in delivering the opinion of the court, said, "The principles adopted seem to be that where the deceased, by a tortious act, acquired the property of the plaintiff, as by cutting his trees and converting them to his own use, or by converting his goods to his own use; although no action of trover or trespass will lie; yet the law will give the plaintiff some form of action, to recover the property thus tortiously obtained. But where by the act complained of, the deceased acquired no gain, although the plaintiff may have suffered great loss; there the rule, *actio personalis moritur cum persona*, applies." So, too, in *Wilbur v. Gilmore* (*supra*), MASTON, J., said, "whenever the property taken by the testator or intestate was converted to his own use, so as to become a part of his assets, an action, in some form, would lie against his representative to recover the value of the property."

Now in the case before us, it is quite clear upon the evidence in the bill of exceptions, that no action for this supposed injury would lie against the personal representatives of the defendant. Trespass would not, for it dies with the person; and assumpsit would not, for no property was acquired by the defendant. His estate has not been benefited by the trespass, if it was one, upon which ground alone, are the personal representatives ever held liable for the wrongful acts of a testator or intestate. As the personal representatives of the defendant would not be liable in this case, I think it clear that he cannot be charged in assumpsit for these goods as sold to him. There is no case, I will venture to say, in which an action for goods sold will lie against a party, where the action would not survive against his personal representatives. If this action can be maintained against the defendant, as for goods sold, it will follow that the personal representatives of every deceased sheriff, coroner or constable, who had wrongfully seized and sold property on execution, must be held liable to respond to the full value of such property, although the proceeds of the sale had been paid over to the creditor in the execution, and the property of the deceased officer had not received a farthing's benefit from the tortious act. This would confound well-known and well-settled distinctions

in this branch of the law, and for aught I see, we might as well hold that trespass lies against executors or administrators, for acts done by their testators or intestates, as to hold that this action for goods sold can be maintained against the defendant. If a promise to pay for the goods was made in fact, or is implied by law, then undoubtedly, his representatives may be sued on such promise. No express promise was pretended in this case; and as the personal representatives of the defendant could not be held liable on anything shown in this bill of exceptions, it may, I think, be safely held, that there is no ground on which the law can imply a promise to pay for the goods.

An action for money had and received is said to resemble a bill in equity, and to lie whenever money has been received by one person which in justice and equity belongs to another. In every such case an agreement to pay over the money thus received is implied by the law. 2 Stark. Ev. 82, ed. of 1842; *Jestons v. Brooke*, Cowp. 795; *Foster v. Stewart*, *supra*; *Browne on Actions at Law*, 515, 518. But this principle is not applicable in its full extent, to an action for goods sold, as the law does not imply an agreement to pay for all goods of which a party may become possessed. "It is a principle well settled," says Chief Justice Mellen, 5 Greenl. 322, "that a promise is not implied against or without the consent of the person attempted to be charged by it. *Whiting v. Sullivan*. 7 Mass. 107. And where one is implied it is because the party intended it should be, or because natural justice requires it, in consequence of some benefit received." It was not shown on the trial of this case that the defendant had received any benefit from the seizure and sale of the property in question. No express promise to pay for the goods was pretended, and every feature of the transaction repels the idea that the defendant intended to have one implied from what he did. He may have been a trespasser, but I see no ground on which he can be held liable for these goods as sold to him. If he can be, such an action is, in almost every imaginable case, a concurrent remedy with trover, replevin and trespass for personal property. It may be a concurrent remedy where the property has been appropriated by a wrongdoer to his own use, but unless that fact is shown, I think no case will be found in which it has been held that a promise to pay for the goods is implied by law. That was not shown on the trial of this cause, and therefore, as it seems to me, the judge erred in holding that the action for goods sold was well brought.¹

¹Accord: *People v. Gibbs* (1832) 9 Wend. 29; *Elliot v. Cronk's Adm's* (1834) 13 Wend. 35.

In *Gloucestershire Banking Co. v. Edwards* (1887) L. R. 19 Q. B. D. 575, the action was held to lie against an under-sheriff and his executors to recover sums wrongfully retained, and in *U. S. v. Daniel* (1848) 6 How. 11, the Supreme Court held that the action against marshal or deputy-marshal would

HURLEY v. LAMOREAUX.

SUPREME COURT OF MINNESOTA.

[29 *Minnesota*, 138.]

APPEAL by defendants from an order of the district court for Hennepin County, YOUNG, J., presiding, overruling their demurrer to the complaint. The entire complaint is recited in the opinion, excepting the description of the real estate.

BERRY, J. The complaint is that on May 1, 1881, the plaintiff "was, and ever since has been and now is, the owner in fee-simple" of certain described premises; that defendants have used and occupied the same from said first day of May; and "that said use and occupation of said premises for said time was and is reasonably worth the sum of \$800." For this sum judgment is demanded.

This action is in the nature of *assumpsit* for use and occupation. It lies only where the relation of landlord and tenant subsists between the parties, founded on agreement express or implied. Taylor on Landlord & Tenant, § 636; Abbott, Trial Ev. 351; Carpenter v. United States, 17 Wall. 489; City of Boston v. Binney, 11 Pick. 1; Mayo v. Fletcher, 14 Pick. 525; Ackerman v. Lyman, 20 Wis. 454; Holmes v. Williams, 16 Minn. 164. As the complaint contains no allegations of any facts showing that the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of the alleged use and occupation, or any part thereof, it fails to state a cause of action, and defendants' demurrer was therefore well taken. The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by defendant, and suing upon an implied contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any way alleged. But the insuperable answer to it is found in the authorities above cited, which hold, in effect, that a trespasser cannot be converted into a tenant without his consent. In other words, to maintain an action for use and occupation, there must have been an agreement, express or implied, by which the relation of landlord and tenant is created between the parties. Privity of contract between them is indispensable.

Order reversed.¹

lie against his executors if assets from the deceased had come to their hands. And see the admirable opinion of Mr. Justice BREWER in Patton v. Brady, Executrix (1901) 184 U. S. 608, 612-615. And so are the authorities generally.—ED.

¹The opinion of the court in Burdin v. Ordway (1896) 88 Me. 375 is as follows:

"Assumpsit for rent. No express promise is shown, and the law does not

HEAD v. PORTER.

CIRCUIT COURT OF THE UNITED STATES, 1895.

[70 *Federal Reporter*, 498.]

COLT, Circuit Judge. This is a motion to dismiss a bill in equity upon the ground that by reason of the death of the defendant the suit has abated, and cannot be revived. The bill is brought for the infringement of a patent, and contains the usual prayer for an injunction and an account of profits. The usual mode of procedure where the defendant dies pending suit is for the complainant to bring a bill of revivor, and for the defendant to raise the question of the survival of the action by demurrer to the bill; but, since the question has been fully argued on the present motion, I will proceed to consider it.

The present bill prays for an injunction as well as an account of profits, and is, therefore, a case within the jurisdiction of a court of equity. It not only asks for an injunction against future infringements, but it calls upon the wrongdoer to refund the profits he has made, "as it would be inequitable that he should make a profit out of his own wrong." Profits are the gains or savings made by the wrongdoer by the invasion of the complainant's property right in his

imply one from the facts in the case. The defendant was tenant of the plaintiff's father. He died, and the tenant denies the title of the plaintiff, who claims to hold as heir. As to him, the tenant has become a disseizor. There was no relation of landlord and tenant between them from which the law implies assumpsit for rent or use and occupation. *Rogers v. Libbey*, 35 Me. 200; *Howe v. Russell*, 41 Me. 446; *Emery v. Emery*, 87 Me. 281. Title to land should not be tried in assumpsit."

See also *Lloyd v. Hough* (1843) 1 How. 153; *Hill v. U. S.* (1892) 149 U. S. 593; *Adsit v. Kaufman* (1903) 121 Fed. 355; *Lathrop v. Standard Oil* (1889) 83 Ga. 307; *Henderson v. Detroit* (1886) 61 Mich. 378; *Dixon v. Ahern* (1887) 19 Nev. 422; *Preston v. Hawley* (1886) 101 N. Y. 586; *Downs v. Finnegan* (894) 58 Minn. 112.

For the history and statutory origin of the action for use and occupation, see the article on the subject by Mr. Ames in 2 Harv. Law Rev. 377.

The case of *Phillips v. Homfray* (1883) L. R. 24 Ch. D. 439 (followed with evident regret in *Leslie v. Calvin* (1885) 9 Ont. 207, but approved in *in re Duncan*, L. R. [1899] 1 Ch. 387) contains an elaborate discussion of the English law on this subject, and an analysis of the cases. Lack of space prevents its insertion. The dissenting opinion of BAGGALLY, L. J., is especially valuable on the subject of "negative enrichment." See also the carefully considered judgment in *Batthyany v. Walford* (1887) L. R. 36 Ch. D. 269. On principle, assumpsit should lie in these cases and should therefore survive against the executors of the tortfeasor. To the lay mind a penny saved is indeed a penny earned; but it will probably be some time before the court catches up with the people. The case of *Sollers v. Lawrence* (1743) Willes, 413, *post*, is a precedent in point.—Ep.

patent. They are the direct pecuniary benefits received, and are capable of a definite measurement. Calling them the "measure of damages in equity" does not mean that they are the same as damages in an action at law. They are clearly not the same. "Profits in equity are the gain, or saving, or both, which the defendant has made by employing the infringing invention. This gain or saving is a fact. It is an actual pecuniary benefit which has resulted directly from the defendant's wrongful use of the plaintiff's property, which he has had and enjoyed, and to which, on equitable theories, the plaintiff is entitled." 3 Rob. Pat. § 1062, note 7, par. 3. At law damages may include profits, but they also include other elements necessary to make up the actual loss, and to give full compensation to the injured party. They may be still further increased by way of punishment for the wrong. But equity, unless by statute, exacts nothing by way of loss or punishment from the wrongdoer except his actual gains. In *Elizabeth v. Pavement Co.*, 97 U. S. 126, Mr. Justice BRADLEY, speaking for the court (page 138), said:

"But one thing may be affirmed with reasonable confidence,—that, if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits. The patentee, in such case, is left to his remedy for damages. It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention. . . . It may be added that, where no profits are shown to have accrued, a court of equity cannot give a decree for profits, by way of damages, or as a punishment for the infringement. *Livingston v. Woodworth*, 15 How. 559. But when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy."

Referring to that case in *Root v. Railway Co.*, the court (page 203) said:

"Accordingly, in that case, the bill was dismissed as to the city of Elizabeth, which had infringed, because it appeared that it had made no profit from the use of the patented improvement, while a decree was rendered against the contractor who had laid the pavement which was the subject of the patent, because he was shown to have made profits from the infringement. The municipal corporation, of course, remained liable to respond in damages in an action at law for any loss which the plaintiff could have established by proof."

By the act of July 8, 1870, c. 230, 16 Stat. 206, the complainant in a bill in equity brought for the infringement of a patent is entitled to recover, in addition to the profits, the damages he has sustained. In referring to this statute in *Birdsall v. Coolidge*, 93 U. S. 64, the court (page 69) said:

"Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement

is plainly greater than the aggregate of what was made by the respondent; in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.'"

In referring to that case in *Root v. Railway Co.*, it is (page 201) declared:

"The whole force of the change in the statute consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone, he would have recovered in another form."

The general rule that personal actions die with the person does not apply where property is acquired which benefits the testator. In the language of the supreme court in *U. S. v. Daniel*, 6 How. 11, 13:

"Where, by means of the offence, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

In the case of *Bishop of Winchester v. Knight*, 1 P. Wms. 406, where the bill prayed for an account of ore dug by the ancestor of the defendant, and the argument was that, this being a personal tort, it died with the person, Lord Chancellor HARDWICKE (page 407) said:

"It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy. It is true, as to the trespass of breaking up meadow, or ancient pasture ground, it dies with the person; but as to the property of the ore or timber it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and, if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it."

In *Lansdowne v. Lansdowne*, 1 Madd. 116, which was a bill for an account of profits for equitable waste, the vice-chancellor (page 139) said:

"This I take to be a just exposition of the qualifications under which the maxim, '*Actio personalis moritur cum persona*,' is received at law; and, if equity is to decide in analogy to a court of law, the question in the present case will be whether, by the equitable waste committed by the late marquis, he derived any benefit; or whether it was a naked injury, by which his estate was not benefited. . . . And as at law, if legal waste has been committed, and the party dies, an action for money had and received lies against his representative, so, upon the same principle, in cases of equitable waste, the party must, through his representatives, refund in respect to the wrong he has done."

In the case of *Phillips v. Homfray*, 24 Ch. Div. 439, Justice BAGGALLAY (page 476) said:

"The general result of these cases, and of others to the like effect, may thus be stated: that a court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the court. The principles thus acted upon by courts of equity are in accordance with the conclusions enunciated by Lord MANSFIELD with reference to actions at common law which survive or die on account of the cause of action; but, as regards those actions which at common law survive or die on account of the form of action, courts of equity will not permit the justice of the case to be defeated by reason of the technicalities of particular procedure."

In *Sayles v. Railroad Co.*, 4 Ban. & A. 239, Fed. Cas. No. 12,424, which was a suit for the infringement of a patent, Judge HUGHES (page 245, 4 Ban. & A., Fed. Cas. No. 12,424) said:

"Let us now suppose the case of a person who takes possession of and uses another's horse, wagon, and team, or threshing machine, without his knowledge, consent, or authority. In such a case . . . the owner may recover damages in trespass for the tort, or he may waive the tort, and sue in assumpsit on the implied promise to pay what is equitably due for the use and possession of the property. . . . The case I have supposed is, in principle, precisely the case we have at bar; for there is no magical quality in the property of the patentee in his patent to distinguish this case from the one just supposed. . . . The act of the defendant was nothing but the simple one of a person taking and using another's property without authority, to his own advantage, and incurring a liability to compensate the owner for such use of the property. The case is, in principle, precisely identical with that of such use of a horse, or a boat, or a wagon and team, or threshing machine, giving a right of action in assumpsit."

In *Stone-Cutter Co. v. Sheldons*, 15 Fed. 608, which was a patent suit, Judge WHEELER (page 609) observed:

"When the Windsor Manufacturing Company sold machines embodying these inventions to the defendants for use, it invaded the orator's rights, and converted the orator's property to its own use. These acts were tortious, and an action would lie for these wrongs. As that company received money for the orator's property, the orator could waive the tort, and sue in assumpsit for the money, or, what is the same in effect, proceed for an account of the money received."

In *Jones v. Van Zandt*, 4 McLean, 599, Fed. Cas. No. 7,503, the court (page 600, 4 McLean, Fed. Cas. No. 7,503) said:

"But, except by statute, actions of torts, replevin, etc., do not survive against the executors or administrators, unless the estate of the de-

ceased received some gain from the wrong, when some form of action will lie."

May v. Logan Co., 30 Fed. 250, was an action at law against the county of Logan for the infringement of a patent, which came before Judges JACKSON and WELKER. Judge JACKSON, in the opinion of the court (page 259), said:

"It would be a strange anomaly in the law if a county, which had thus wrongfully appropriated a patentee's invention and property, could escape liability for damages thence resulting to the owner by the simple device of calling the illegal act a tort, or by saying that the remedy by an action on the case, which congress had provided, was appropriate or applicable only to torts. . . . The patentee's rights and remedies are created and defined by congress, which has, under the constitution, the exclusive control of the subject. The right is given and remedy created by federal statute, which does not except counties from the obligation to respect the exclusive grant to the patentee of making, selling, and using his invention. Judicial refinements and distinctions upon the character of the remedy prescribed by congress for violations of the patentee's rights, conferred by statute of the general government, should not be resorted to either to defeat the right or impair the remedy. If congress had not directed that an action on the case should be the remedy for the recovery of damages for the infringement of a patent, the patentee could, in cases like the present, waive what is called the tortious act, and bring assumpsit upon the implied contract against the county to recover the value of his property appropriated. It is refining too much to allow the nature of the action to defeat the actual and substantial rights."

An invention involves the conception of means, which, when embodied in a concrete form, may become the subject of a patent. "It is a mental result, . . . and the machine, process, or product is but its material reflex and embodiment." *Smith v. Nichols*, 21 Wall. 112, 118. A patent is an incorporeal property right in an invention, created by statute. Property rights, whether corporeal or incorporeal, are governed by the same principles, and should receive equal protection. When a person wrongfully appropriates a patented invention, it is an invasion of the patentee's right of property, and the gains or profits derived from such piracy belong to the patentee. Because the machine in which the wrongdoer may have embodied his piracy may not belong to the patentee does not affect the real character of the act. I can see no difference in principle between a suit by the owner of a patent against an infringer to recover the profits he has made and a suit by the owner of land or of a mine against a wrongdoer to recover the value of timber or ore taken. I cannot assent to the proposition that the profits actually made by an infringer, for which recovery is sought by a bill in equity, are the same as damages in an action of libel, slander, diversion of a water course, trespass in

breaking up meadow or pasture land, and similar actions of tort. The former are the actual, direct, pecuniary benefits, capable of definite measurement, acquired by the wrongdoer; the latter are primarily the loss suffered by the injured party where the wrongdoer realizes no pecuniary benefits, or only such as are indirect, indefinite, or rest in speculation, compromise, or arbitrary adjustment. For these reasons I am of opinion that this cause of action survives, and that the motion to dismiss should be denied.

Motion denied.¹

SOLLERS v. LAWRENCE.

COURT OF COMMON PLEAS, 1743.

[Willes, 413.²]

THE opinion of the Court was delivered, as follows, by WILLES, Lord Chief Justice. Debt. The plaintiff declares upon the judgment of five of the commissioners, who are made a court of record, and are appointed to hear and determine all differences and disputes touching and concerning the rebuilding of houses and other buildings in the town of *Blandford* burned down or demolished by the late dreadful fire by an act made 5 Geo. 2. c. 16.

As to the merits; the only objections are,

1st, That this house being burned in the general conflagration, and it not being pretended that *Riley* was in any default, therefore he was not obliged to contribute anything to rebuild the house, and consequently his representatives could not be obliged; for as they stand only in his place they cannot be liable farther than he was.

2dly, It was said that if he were obliged, no suit could be brought against his executors or administrators, for that *actio personalis* (as this is) *moritur cum personâ*.

3dly, It was objected that there was no foundation for the rule and measure of damages, which the commissioners plainly went by, to give the fifth part of the profits during the life of *Riley*.

These being questions properly belonging to the Ecclesiastical Courts, and the books which were cited being very dark in relation to these matters, it was thought proper to hear civilians, and from the best lights that we could get from them the objections seem to be of no weight. To be sure if *Riley* were not liable, his executors or administrators were not.

¹Accord: *Kirk v. DuBois* (1886) 28 Fed. 460; *Hohorst v. Howard* (1888) 37 Fed. 97; *Griswold v. Hilton* (1898) 87 Fed. 256.

Contra: *Child v. Boston & Fairhaven Iron Works* (1884) 137 Mass. 516; *Leslie v. Calvin* (1885) 9 Ont. 207.

²Only part of the opinion is given.—Ed.

It is proper therefore to consider in the first place whether he was liable. It is certain that if a parsonage or vicarage-house be burned down, there must be some way of rebuilding it for necessity's sake and the good of the public; for there must be parsons and vicars, and they must have houses to live in; it follows therefore that when they are burned down they must be built up again. If the suit be brought *ex officio* in the lifetime of the incumbent, (and it must be so because no one is interested to bring it,) Dr. *Paul* informed us that the constant rule is to order a fifth part of the profits of the living to be set apart in order to rebuild the house. This must plainly be for necessity's sake and when the incumbent is in no default: for if he be in fault, he ought (as in the general case of dilapidations) to pay the whole. Several cases were cited by Dr. *Paul* to this purpose; the case of the Deanry-house and the Chancellor's house at *Chichester*, and the case of the vicarage-house of *Worminghall* in *Berkshire*; which though not cases directly in point yet plainly shewed that the Ecclesiastical Courts usually went by this rule, and they founded their determinations on the injunctions of *Ed. VI.* and Queen *Elizabeth*, and an injunction of Archbishop *Cranmer*, enforcing the same and ordering them to be observed; which though perhaps not strictly law were very proper measures for the Ecclesiastical Courts to govern themselves by, when they otherwise must judge arbitrarily and without any rule at all. As therefore the commissioners were under a necessity of giving some damages, as this is a very equitable rule, as it is observed in the ecclesiastical courts and founded on the authorities before mentioned, and as the common law is quite silent in relation to this matter, I do not see what better rule the commissioners could govern themselves by. Therefore the first and third objections seem to be of no weight.

As to the second, that the action will not lie against the executors though there might be a remedy against *Riley*, it is contrary to all the rules laid down concerning dilapidations and the constant practice in relation to suits of this sort; for both in the ecclesiastical and temporal courts, since these suits have been retained here, multitudes of suits, nay most of them, have been against the executors or administrators, and have been always holden to be good, because it is not considered as a tort in the testator, but as a duty which he ought to have performed, and therefore his representatives, so far as he left assets, shall be equally liable as himself. And for this reason, it is not contrary to the rule that *actio personalis* (which is always understood of a tort) *moritur cum personâ*; as actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years.

We think therefore that the commissioners had a jurisdiction; and as nothing appears upon the record to shew that they have determined

wrong, we must intend that it appeared before them that the testator left assets, otherwise that they would not have made a personal decree against the defendants; and therefore we are of opinion that judgment must be for the plaintiff.

—*N.* I and my Brother BURNETT only were present in court at the time of giving this opinion; my Brothers FORTESCUE A. and ABNEY not having heard the arguments: but Lord Chief Baron PARKER, who heard the arguments and consulted with us, gave me authority to say that he was of the same opinion.¹

FERRILL'S ADMINISTRATRIX v. MOONEY'S EXECUTORS.

SUPREME COURT OF TEXAS, 1870.

[33 *Texas*, 219.]

MORRILL, C. J. The points for adjudication, and which are raised by the pleadings in this case are:

First—Whether a claim for killing and butchering and *using*² certain animals, against a party thus trespassing, abates by the death of the trespasser or claimant, or of both.

Second—Whether the statutes of limitation apply when there is no administration on the estate of the party claiming the damages.

Third—Whether it is necessary to present the claim for the damages to the administrators of the estate of the one taking the animals.

As the injuries complained of did not affect the person injured, either physically, morally or mentally, but only in his property, and as the pleadings do not raise or seek vindictive or exemplary damages for a tort, but simply seek to recover the value of property, this is not a personal action. It is simply an action to recover property or its value. The wrongful method of obtaining the property cannot be considered, but simply the value of the property, in the same manner as if it had been obtained by consent of the owner.

In the case of *Taney v. Edwards*, 27 *Texas*, 225, the court say: "That in all cases of injuries to the *person*, whether by assault, battery, false imprisonment, slander or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives," by the common law of England.

¹Accord: *Bryan v. Clay, Executor* (1852) 1 B. & E. 38. See also, *Batthyany v. Wafford* (1887) L. R. 36 Ch. D. 269, 280, where the principal case is cited with approval.—Ed.

²The italics are the editor's, and only a part of the opinion relating to first question is printed.—Ed.

BOOK II.
THE OBLIGATION OF QUASI-CONTRACT.

CHAPTER I.

WHERE THERE IS NO CONTRACT, ACTUALLY OR IN CONTEMPLATION
OF THE PARTIES.

SECTION I.

WHERE THE PLAINTIFF HAS SUFFERED A TORT.

1. WAIVER OF TORT ACTION.

LAMINE *v.* DORRELL.

COURT OF KING'S BENCH, 1705.

[2 *Lord Raymond*, 1216.]

IN an *indebitatus assumpsit* for money received by the defendant to the use of the plaintiff as administrator of *J. S.* on *non assumpsit* pleaded, upon evidence the case appeared to be, that *J. S.* died intestate possessed of certain *Irish* debentures; and the defendant pretending to a right to be administrator, got administration granted to him, and by that means got these debentures into his hands, and disposed of them: then the defendant's administration was repealed, and administration granted to the plaintiff, and he brought this action against the defendant for the money he sold the debentures for. And it being objected upon the evidence, that this action would not lie, because the defendant sold the debentures as one that claimed a title and interest in them, and therefore could not be said to receive the money for the use of the plaintiff, which indeed he received to his own use; but the plaintiff ought to have brought *trover* or *detinue* for the debentures: the point was saved to the defendant, and now the court was moved, and the same objection made.

POWELL, Justice. It is clear the plaintiff might have maintained *detinue* or *trover* for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of *assumpsits*. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an

action for the money they were sold for, as money received to his use. It has been carried thus far already. Howard and Wood's case, 2 Lev. 245 is as far: there the title of the office was tried in an action for the profits.

HOLT, Chief Justice. These actions have crept in by degrees. I remember, in the case of Mr. *Aston*, in a dispute about the title to the office of clerk of the papers in this court, there were great counsel consulted with; and Sir *William Jones* and Mr. *Saunders* were of opinion, an *indebitatus assumpsit* would not lie, upon meeting and conferring together, and great consideration. If two men reckon together, and one overpays the other, the proper remedy in that case is a special action for the money overpaid, or an account; and yet in that case you constantly bring an *indebitatus assumpsit* for money had and received to the plaintiff's use. Suppose a person pretends to be guardian in socage, and enters into the land of the infant, and takes the profits, though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator? If an action of trover should be brought by the plaintiff for these debentures after judgment in this *indebitatus assumpsit*, he may plead this recovery in bar of the action of trover, in the same manner, as it would have been a good plea in bar for the defendant to have pleaded to the action of trover, that he sold the debentures, and paid to the plaintiff in satisfaction. But it may be a doubt if this recovery can be pleaded before execution. This recovery may be given in evidence upon not guilty in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.

Afterwards the last day of the term, upon motion to the court, they gave judgment for the plaintiff. And HOLT said, that he could not see how it differed from an *indebitatus assumpsit* for the profits of an office by a rightful officer against a wrongful, as money had and received by the wrongful officer to the use of the rightful.¹

¹In an able and instructive article "On the right to waive a tort and sue in assumpsit," 3 Albany Law Journal, 141 *et seq.*, Judge COOLEY says: "The right to waive a tort and sue in assumpsit, seems to have been first distinctly recognized in *Lamine v. Dorrell*."

For the various steps by which assumpsit swallowed up account and debt, see Mr. Ames in 2 Harv. Law Rev. 67.

Cummings v. Vorce (1842) 3 Hill, 282 (valuable as to plaintiff's various remedies); *Roberts v. Evans* (1872) 43 Cal. 380; *Fiquet v. Allison* (1864) 12 Mich. 328 (assumpsit against tenant for removing wheat); *McGoldrick v. Willits* (1873) 52 N. Y. 612; *Bowman v. Browning* (1856) 17 Ark. 599; *Huganir v. Cotter* (1899) 102 Wis. 323; *Krump v. First State Bank* (1898)

HINDMARCH v. HOFFMAN.

SUPREME COURT OF PENNSYLVANIA, 1889.

[127 *Pennsylvania State*, 284.¹]

MR. JUSTICE STERRETT delivered the opinion of the court:

ON the morning of October 10, 1885, Richard Savanack stole from plaintiff, in Buffalo, N. Y., a large sum of money, four hundred dollars of which he afterwards, on the same day, deposited with defendant, to be returned to him or upon his order. When defendant received the money, he was ignorant of the fact that it had been stolen from plaintiff by Savanack, but, while it was still in his possession and under his control, he was notified of that fact by plaintiff's attorney, and that plaintiff claimed it as his property. Notwithstanding the notice, he afterwards paid the money, "upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money." Afterwards, upon defendant's refusal to pay the amount to plaintiff, this action of assumpsit was brought to recover the same.

It does not appear to have been even questioned in the court below, that, upon the established facts, plaintiff had a good cause of action, but the learned judge was of opinion that he could not recover in the present form of action, and he accordingly entered judgment for defendant. His conclusions of law were duly excepted to, and they now constitute the specifications of error before us.

As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff, never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these

8 N. D. 75; *Downs v. Finnegan* (1894) 58 Minn. 112; *Phelps v. Conant* (1858) 30 Vt. 277; *Timber & Land Co. v. Brooks* (1891) 109 N. C. 698.—Ed.

So money received by defendant for one purpose, if used by him for another, may be recovered in assumpsit. *Core's case* (1537) Dyer, 20a; *De Bernales v. Fuller* (1790) 14 East, 590 note; *Murray v. Clay* (1848) 9 Ark. 39; *Hotchkiss v. Judd* (1866) 12 Allen, 447; *Kerrigan v. Kelly* (1852) 17 Mo. 275; *Strong v. Bliss* (1843) 6 Met. 393; *Boston Bank Cases* (1874) 10 Ct. Cl. 515, 545; *Bahnsen v. Clemmons* (1878) 79 N. C. 556; *Catlin v. Richard* (1865) 13 Mich. 110; *Parker v. Fisher* (1866) 39 Ill. 164; *Critzer v. McConnel* (1853) 15 Ill. 172.—Ed.

¹Reported also in 88 *Law Times*, 86; S. C. 14 *Am. St. Rep.* 842 and note.—Ed.

circumstances, it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so, but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner, and there is no good reason why it should not be recovered in the present form of action.

In *Clarke v. Shee*, 1 Cowp. 197, it was held that case, for money had and received, will lie by the true owner of money against a third person into whose hands it came mala fide, provided its identity can be traced or ascertained. Referring to the form of action in that case, Lord MANSFIELD characterized it as "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action."

In 2 Greenl. Ev. 13 ed. §§ 102 and 120, the principle is thus stated: "Where the defendant is proven to have in his hands the money of plaintiff, which ex æquo et bono he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and after verdict the promise is presumed to have been actually proved." "So, if money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring assumpsit on the common counts."

Assumpsit was also sustained in *Mason v. Waite*, 17 Mass. 558, upon the following facts: Bank notes, done up in a package, were delivered by the owner to a carrier, who, without authority, paid them to a third party for a loss at a faro table. In an opinion sustaining a judgment in favor of the owner of the notes, against the party to whom they were thus paid, the chief justice, after remarking that trover would have been the better action but for the difficulty of identifying bank notes, said: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money, and as to any want of privity or any implied promise, the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."

The defendant, in the case at bar, did not better his position by improperly handing over the money in question to those who had no right whatever to receive it, after he knew it had been stolen and that plaintiff was its true owner. The undisputed facts connected with his possession of the money, immediately before he parted with it, are quite sufficient to raise such an implied promise as will support assumpsit. We are therefore of opinion that the court erred in not entering judgment in favor of plaintiff for the amount claimed, viz.:

four hundred dollars with interest from May 24, 1886, the time suit was commenced before the city recorder.

Judgment reversed and judgment is now entered in favor of the plaintiff and against the defendant for four hundred dollars with interest from May 24, 1886, and costs.¹

MILLER *et al.*, EXECUTORS v. MILLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1828.

[7 *Pickering*, 133.]

ASSUMPSIT for money had and received. Pleas, the general issue and the statute of limitations. It appeared at trial that testator and defendant were tenants in common of a lot, and that the defendant cut and sold some wood from the lot so held. For some of the wood sold, the defendant received in payment real estate. There was no evidence of any request by the testator to the defendant to account, or to pay the money received by him, nor that the real estate received in payment for wood had been sold by the defendant.

Upon this evidence the jury were instructed to find a verdict for the plaintiff for one-half of the amount which the defendant had received in payment for wood sold from the lot owned in common, within six years before the commencement of this action, whether the payment was made in money or real estate, or otherwise. They were also instructed to include all the payments made upon the note within that period, and the credits given to the defendant at the furnace, provided they were satisfied that he availed himself of them.

A verdict was found for the plaintiff, and the defendant excepted to the above instructions.²

The opinion of the court was drawn up by

PARKER, C. J. It does not appear that at the trial there was any controversy about the title of the parties to the land from which the wood was taken, the price of which was sued for in this action. If

¹So action for money had and received will lie against an infant for money embezzled. *Bristow v. Eastman* (1794) 1 Esp. 172; *Elwell v. Martin* (1859) 32 Vt. 217. See also: *Howe v. Clancy* (1865) 53 Me. 130; *Boston R. R. Co. v. Dana* (1854) 1 Gray, 83; *Gould v. Baker* (1896) 12 Tex. Civ. App. 699 (where the authorities are well considered).

To recover from the defendant in the action of money had and received, money must have come to the hands of the defendants. *Manahan v. Gibbons et al.* (1822) 19 Johns. 427; *Dewey v. Supervisors* (1875) 62 N. Y. 294 (holding defendant liable for benefit actually received); *N. Y. Guaranty Co. v. Gleason* (1879) 78 N. Y. 503.

²Short statement substituted for that of the original report.—ED.

that had been the point in dispute, the plaintiff might have been nonsuited, and turned over to his writ of entry or petition for partition. The action proceeded on the admitted fact, that the plaintiff and defendant were tenants in common of certain land, and the question was, whether the wood was taken from that land, and if so, whether the defendant was liable for a moiety of the proceeds. We think the objection since raised, that the action involved the question of title to real estate, cannot now be made.

As to the objection founded on the statute of limitations, we think the jury were instructed right, *viz.*, that the statute began to run from the time when the money was received, and not from the time of the sale of the wood. In this action the plaintiff affirms the sale and asks for his share of the proceeds. He had a right to waive his action of trespass given by the statute and to consider the defendant as his agent in disposing of the wood. This is for the benefit of the defendant, as he can deduct all reasonable charges, and is answerable only to the extent of funds which he has received.

In regard to the objection that the price of some of the wood was received in real estate, we think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that real estate shall be substituted. Suppose after selling the wood for money to be paid at a future day, the defendant had set off a debt which he owed the purchaser, for the price; he would virtually have received the money. So he has by taking the real estate.¹

WATSON v. STEVER.

SUPREME COURT OF MICHIGAN, 1872.

[25 *Michigan*, 386.]

COOLEY, J. Stever, as assignee of one Sheldon, sued Watson in assumpsit to recover the value of logs which Watson had taken possession of, claiming to have bought of third persons. There is no dispute that, if the logs belonged to Sheldon, Watson was liable for their value in trespass or trover; but there had never been any promise on his part to pay Sheldon for them, and, on the contrary, he had always denied his right. If there was any exception to this statement,

¹An action for money had and received will not lie to recover money expended on account of the tortious act of the defendant. *Foster v. Dupré* (1817) 5 *Martin*, 6.

And see on the general question *Ainslie v. Wilson* (1827) 7 *Cow.* 662; 17 *Am. Dec.* 532, 537, note.

it was on one occasion when Sheldon's agent demanded certain logs, and Watson said, if the agent could identify any in his possession as belonging to Sheldon, he would pay for them. One was identified and paid for, and the agent said more of them belonged to Sheldon, but as he could not identify them, Watson refused to recognize any further right. It was not shown that Watson had sold any of the logs. The circuit judge charged the jury, that if they found Sheldon owned the logs, and they were used by Watson without Sheldon's consent, Watson was liable for the value, in this form of action. And he refused to charge, as requested by defendant, that if Watson took and retained the property under a *bona fide* claim of title in himself, the plaintiff could not recover in this action.

There are not wanting decisions which support the rulings of the circuit judge; but the great weight of authority, as well as the tendency of recent decisions, is the other way. If one has taken possession of property, and sold or disposed of it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrongdoer, but may affirm the sale, as made on his behalf, and demand in this form of action the benefit of the transaction. But we cannot safely say the law will go very much further than this in implying a promise, where the circumstances repel all implication of a promise in fact. Damages for a trespass are not in general recoverable in assumpsit; and in the case of the taking of personal property, it is generally held essential that a sale by the defendant should be shown.—*Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Wolcott*, 2 Allen. 227; *Stearns v. Dillingham*, 22 Vt. 627; *Mann v. Locke*, 11 N. H. 248; *Smith v. Smith*, 43 N. H. 536; *Willet v. Willet*, 3 Watts. 277; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Guthrie v. Wickliffe*, 1 A. K. Marsh. 83; *Fuller v. Duren*, 36 Ala. 73; *Sanders v. Hamilton*, 3 Dana. 552; *Barlow v. Stalworth*, 27 Geo. 517; *Pike v. Bright*, 29 Ala. 332; *Tucker v. Jewett*, 32 Conn. 563; *Emerson v. McNamara*, 41 Me. 565; *Morrison v. Rogers*, 2 Seam. 317; *O'Reer v. Strong*, 13 Ill. 688; *Elliott v. Jackson*, 3 Wis. 649. The case of *Fiquet v. Allison*, 12 Mich. 330, on which reliance was placed by defendant in error, is clearly distinguishable from this. There the parties stood in contract relations as tenants in common in respect to the property in question; and when the defendant appropriated his co-tenant's share, and refused to recognize his right therein, he was, as the court pointed out, guilty of breach of a duty which the law implied from his express contract. This case presents no corresponding feature, and to sustain an action as upon an implied contract here would be to disregard the primary distinctions in the forms of action.

The judgment must be reversed, with costs, and a new trial ordered. CAMPBELL and GRAVES, JJ., concurred.

CHRISTIANCY, Ch. J., did not sit in this case.¹

¹*Pike v. Bright* (1856) 29 Ala. 332; *Sandeen v. Kansas City R. R. Co.* (1883) 79 Mo. 278; *Miller v. King* (1880) 67 Ala. 575; *Fuller v. Duren* (1860)

NORDEN v. JONES.

SUPREME COURT OF WISCONSIN, 1873.

[33 *Wisconsin*, 600.]

DIXON, C. J.¹ The question presented on the rejection of the \$6.00 item is an interesting one, upon which there exists considerable contrariety of opinion and decision, both in England and this country. It was a charge of that sum made by the defendant against the plaintiff for pasturing the plaintiff's cattle, which the defendant testified the plaintiff had let into his, the defendant's, field, by laying down defendant's fence for that purpose. The objection sustained by the justice was, that the laying down of the fence and turning in of the cattle was a trespass on the part of the plaintiff, which could not be brought in or proved as a set-off or cross-demand in this form of action, but that the defendant must resort to his action of trespass against the plaintiff to recover the damages which he has sustained. It is not to be denied that there are numerous decisions of most respectable courts sustaining this view, while on the other hand there is an equal weight of most respectable authority also for holding that a promise to pay will be implied under such circumstances, upon which an action of *assumpsit* may likewise be maintained. The question being new in this court under our present statutes, we are at liberty to adopt such rule as in our judgment will best subserve the ends of justice, which is or ought to be the object of all rules laid down in the course of judicial proceedings. The cases of *Conklin v. Parsons*, 1 Chand. 240, and *Pierce v. Hoffman*, 4 Wis. 277, were controlled by the language of subdivision 3 of sec. 1, ch. 94, R. S. 1849, then in force. That subdivision was omitted altogether in the present revision, thus making a material change in the law of set-off. R. S. 1858, ch. 126, sec. 1 (2 Tay. Stats. 1448, § 1). The language of the court in *Conklin v. Parsons* favors rather than disfavors the general right to waive the tort and sue in *assumpsit* for a mere conversion of property. And see *Keyes v. Railway Co.*, 25 Wis. 691.

36 Ala. 73 (exchange of property); *Smith, Poley & Co. v. Jernigan* (1887) 83 Ala. 256; *Chamblee v. McKenzie* (1876) 31 Ark. 155; *Barlow v. Stalworth* (1859) 27 Ga. 517; *Rogers v. Greenbush* (1869) 57 Me. 441; *Jones v. Hoar* (1827) 5 Pick. 285 (and see elaborate opinion in the note); *Berkshire Glass Co. v. Wolcott* (1861) 2 Allen, 227; *Smith v. Smith* (1862) 43 N. H. 536 (overruling *Hill v. Davis* (1826) 3 N. H. 384); *Bethlehem Borough v. Perseverance Fire Co.* (1876) 81 Pa. St. 445; *Schweizer v. Weiber* (1853) 6 Rich. 159 (watches destroyed by fire); *Tuttle v. Campbell* (1889) 74 Mich. 652; *Barnum v. Stone* (1873) 27 Mich. 332; *Quimby v. Lowell* (1897) 89 Me. 547.—Ed.

¹Part of the opinion is omitted.—Ed.

Mr. Nicholas Hill, in his notes to the cases of *Putnam v. Wise*, 1 Hill, 240, and *Berly v. Taylor*, 5 Hill, 584, has collected nearly all the adjudications up to the time of publication (1844), as well as those which hold the narrower rule, which in general limits the right to waive the tort and sue in *assumpsit* to cases where goods have been taken from the plaintiff and sold by the wrongdoer and the money received by him, as those which establish a more liberal principle by declaring the right of the injured party to waive the tort and bring *assumpsit* in a variety of cases where the fruits of the trespass or wrong have not become or been turned into money or its equivalent in the hands of the tortfeasor. Judge REDFIELD, in *Centre Turnpike Co. v. Smith*, 12 Vt. 217, resolves the cases coming within the narrower rule into four classes, to which the case of *Jones v. Hoar*, 5 Pick. 290, adds a fifth class not named by Judge REDFIELD. The underlying question in all the cases obviously is, When and under what circumstances will the law imply a promise on the part of the defendant to pay? "It is a principle well settled," say the court, in *Webster v. Drinkwater*, 5 Greenl. 322, "that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received." Tested by the latter as the governing principle upon which the law raises a promise to pay, it is very obvious that the more liberal rule is the correct one, and that which should prevail.

And such is the rule for which Mr. Hill contends, of whose great ability and acknowledged attainments in his profession it is unnecessary for us here to speak. It will be conceded by all that his opinion is entitled to very great weight, sustained as he is by the language of the court in the two cases to which his notes are appended, as well as by other decisions to which he refers, and especially those in New Hampshire and Maryland. *Hill v. Davis*, 3 N. H. 384;¹ *Stockett v. Watkins*, 2 Gill & John. 326, 342, 343. We give the concluding portion or paragraph of his note to the first case, with his citations, as they appear in the volume above referred to. He says: "The above cases from the Maryland and New Hampshire reports are sustained by the *dicta* of JACKSON, J., in a Massachusetts case decided some time previous to *Jones v. Hoar*, *supra*, *Cummings v. Noyes*, 10 Mass. R. 433, 435, 436. And see the observations of MAISON, senator, in *Butts v. Collins*, 13 Wend. 153, 154; also *Ford v. Caldwell*. 3 Hill (S. C.), 248, especially the opinion of RICHARDSON, J., p. 250. They seem also in accordance with the principle of several English decisions, viz., that the tortfeasor should not be allowed, under such circumstances, to set up his own wrongful intent in disavowal of the implied promise which the law would otherwise raise against him. Chitty on Contracts. 6;

¹*Hill v. Davis* (1826) 3 N. H. 384, was overruled by *Smith v. Smith* (1862) 43 N. H. 536.—Ed.

Hill v. Perrott, 3 Taunt. 274, 275, *per curiam*; Lightly v. Clouston, 1 *id.* 112, 114, *per* MANSFIELD, C. J.; 1 Leigh's N. P. 4, 5; *per* MAISON, senator, in Butts v. Collins, 13 Wend. 154, 155. Apart from all reasoning of a technical or artificial character, and looking to the substantial ends of justice, it is quite difficult to see why this principle should not be applied in cases like Jones v. Hoar, and Willett v. Willett, supra. In neither could the defendant have been prejudiced by allowing the plaintiff to sue in *assumpsit*; on the contrary, the practice generally operates to favor the defendant, as the plaintiff thereby foregoes his right to damages for the tort as such, and restricts himself to the simple value of the property. See *per* Lord MANSFIELD, in Lindon v. Hooper, 1 Cowp. 419; *per* BAYLEY, J., in Foster v. Stewart, 3 Moule and Selw. 201, 202; *per* MAISON, senator, in Butts v. Collins, 13 Wend. 156. The defendant, moreover, gets the right of set-off, which would be precluded by denying the plaintiff his election. *Per* HEATH, J., in Lightly v. Clouston, 1 Taunt. 114, 115. Nor would the defendant be likely to suffer embarrassment by the form of pleading. *Per* Lord MANSFIELD, in Lindon v. Hooper, 1 Cowp. 414, 419. And clearly he could not be said to incur any hazard from a second action in tort for the same matter. See 1 Phil. Ev. 333, 7th ed.; Rice v. King, 7 Johns. 20; McLean v. Hugaren, 13 *id.* 184."

And in his remarks upon the second case, 5 Hill, 584, he says that "the observations of the judges in Young v. Marshall, 8 Bing. 43 (21 E. C. L. 215) are worthy of attention as illustrating the principle on which the English doctrine rests. The action was for money had and received, and was brought by the assignee of a bankrupt, against the sheriff, on the ground that he had wrongfully sold goods belonging to the plaintiff on a *fi. fa.*; and it was objected that the action should have been trover, especially as the money had been paid over to the execution creditor before suit commenced. The court, however, overruled the objection, holding that the plaintiff *might* but was not *bound* to go for the tort. TINDAL, C. J., there stated the rule to be, that '*no party is bound to sue in tort, where, by converting the action into an action on contract, he does not prejudice the defendant*; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action *lets in a set-off*, and enables him to pay money into court.' BOSANQUET, J., denied that the plaintiff who brings *assumpsit*, in such case, thereby affirms the acts of the sheriff; 'he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of the sale.'"

And still another most material advantage which the wrongdoer derives from the waiver of the tort and suit in contract, in this state, is freedom from arrest and imprisonment, to which he would otherwise be liable and might be subjected.

We conclude, therefore, that the doctrine of the authorities above quoted, and for which Mr. Hill contends, is the better one, and must

accordingly hold that the justice was in error when he excluded the evidence offered by the defendant in support of the item in his counterclaim against the plaintiff for the pasturage of the plaintiff's cattle.

The judgment of the circuit court must be reversed, and the cause remanded with directions to that court to reverse the judgment of the justice.

By the Court.—It is so ordered.¹

IN *Braithwaite v. Akin* (1893) 3 N. D. 365, 369, CORLISS, J., said:

It is contended that the defendant Braithwaite had a right to waive the tort involved in the conversion of his interest in the steamboat, and sue in the assumpsit. The averments of the counterclaim would not bring him within the rule that a tort may be waived, as it is laid down in many of the cases. The doctrine that the injured party may waive the tort and sue in assumpsit is limited by these decisions to cases where the wrongdoer has sold the property, and received therefor money or money's worth. *Jones v. Hoar*, 5 Pick. 290; *Mhoon v. Greenfield*, 52 Miss. 434; *Willet v. Willet*, 3 Watts, 277; *Stearns v. Dillingham*, 22 Vt. 624; *Watson v. Stever*, 25 Mich. 387; *Baleh v. Pattee*, 45 Me. 41; *Kidney v. Persons*, 41 Vt. 386; 1 Am. & Eng. Enc. Law, 888; cases in note to *Webster v. Drinkwater*, 17 Am. Dec. 242; *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. Rep. 384; *Moses v. Arnold*, 43 Iowa, 187. There is no allegation in the answer that the interveners ever sold the steamboat, or in any manner received money or money's worth for her. But we are of opinion that this limitation of the doctrine that the tort may be waived is without foundation in reason or principle. The whole doctrine is built upon a fiction. It asserts that what was done in defiance of the owner's rights was in law done with the most perfect regard for his rights; that the wrongdoer has received the money for the owner, or that he has bought the property from the owner at its fair value. This fiction is indulged only in the interests of the owner, and it rests upon the receipt by the wrongdoer of benefits accruing to him from his wrongful acts. Where no benefits are received, the liability is only for the wrong. As this right in the injured party to turn the tort liability into a contract liability stands upon the receipt of benefits by the wrongdoer, is it not beneath the dignity of any tribunal to draw a distinction between the receipt of benefits in the shape of cash and the receipts of benefits in the form of property? In our judgment, the fact that a sale has not been made is unimportant. Not only upon sound principle, but also upon the foundation of strong authority, do

¹*Evans v. Miller* (1880) 58 Miss. 120, 124; *Central Gas & Electric Fixtures Co. v. Sheridan* (1892) 22 N. Y. Supp. 76; contra: *Baleh v. Patten* (1858) 45 Me. 41.—ED.

we establish the rule in this state that the owner of property converted may waive the tort and sue in assumpsit for the benefits received whenever the tortfeasor receives benefits of any kind from the wrong committed, whether by sale or by retention of the converted property, or in any other manner. *Norden v. Jones*, 33 Wis. 600-604; *Hill v. Davis*, 3 N. H. 384; *Stockett v. Watkins*, 2 Gill & J. 326-342; *Barker v. Cory*, 15 Ohio, 9; *Berley v. Taylor*, 5 Hill (N. Y.) 583; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. Rep. 272; *Fratt v. Clark*, 12 Cal. 89. See note to *Webster v. Drinkwater*, 17 Am. Dec. 244. That the claim of defendant Braithwaite to recover in assumpsit the value of his interest in the boat would have been a good counterclaim had he waived the tort and sued in assumpsit cannot be doubted. When the tort is waived, the claim rests in contract, as well for the purpose of making it a cause of action arising on contract within the statute regulating counterclaims as for other purposes. In fact, the sole object in waiving the tort is often for the purpose of enabling the injured party to set up his claim as an offset, when, without such waiver, he could not, because of its tort nature, use it as a counterclaim. *Norden v. Jones*, 33 Wis. 600; *Coit v. Stewart*, 50 N. Y. 17; *Brady v. Brennan*, 25 Minn. 210; *Car Co. v. Reinhardt* (Com. Pl. N. Y.) 20 N. Y. Supp. 872; *Wood v. Mayor*, 73 N. Y. 556; *Barnes v. McMullins*, 78 Mo. 260; *Becker v. Northway*, 44 Minn. 61, 46 N. W. Rep. 210; *Evans v. Miller*, 58 Miss. 120; *Pom. Rem. & Rem. Rights*, § 801.¹

STARR CASH COMPANY *v.* REINHARDT.

COMMON PLEAS OF NEW YORK CITY AND COUNTY, GENERAL TERM,
1892.

[20 *New York Supplement*, 872.]

PRYOR, J. The action is for the purchase price of 15 cash carriers, sold and delivered by the plaintiff to the defendants. The answer, by not denying, admits the price and the sale and delivery of the cash carriers, and then proceeds to plead a counterclaim, as follows: That there was on the premises of the defendants a certain car system; that when the plaintiff placed its service in the store of the defendants it took to itself the old service of the defendants, and applied the same to its own use and benefit, without the knowledge of the defendants; that the reasonable value of the said old service was \$150; that the defendants have demanded from the plaintiff a deduction to that amount from its bill, and have tendered to the plaintiff the sum of

¹See *Newman v. Olney* (1898) 118 Mich. 545; *Florida Cent. Co. v. Scarlett* (1899) 91 Fed. 349.—Ed.

\$150, and hereby offer to allow judgment to be taken against them for the sum of \$150, with interest and costs. At the trial plaintiff moved for judgment upon the pleadings, "on the ground that the answer did not deny any of the allegations of the complaint, and did not set up a counterclaim which could properly be interposed in this action." The motion was granted, and judgment directed for plaintiff for the full price of the cash carriers, to which order and direction defendants duly excepted. The sole question for decision is whether the facts alleged constitute a valid counterclaim.

Undoubtedly the facts stated in the answer constitute a cause of action for conversion. But "if, upon the facts alleged, a cause of action in tort, as well as one on contract, may be spelled out," the pleader may elect to stand either upon tort or contract. *People v. Wood*, 121 N. Y. 522, 24 N. E. Rep. 952. Do the defendants in their answer rely upon tort or contract? Manifestly upon contract. Their claim is not damages for the conversion, but the specific value of the goods applied by the plaintiff to its use and benefit; and that value they plead as a counterclaim, which would be inadmissible were the claim of damages for a tort. Beyond all controversy, the defendants elect to treat their cause of action as a claim upon contract.

But it does not appear that the plaintiff has sold the thing taken,—the contrary, rather; and the question remains whether the owner of a chattel converted, but not parted with, for money or its equivalent, may waive the tort, and sue the wrongdoer in *assumpsit* as upon an implied contract of sale. It is conceded that in England, and in many states of the Union, the query must be answered in the negative. See cases collected by Mr. Freeman in his note to *Webster v. Drinkwater*, 17 Amer. Dec. 242. Nay, more, in this state the law was that trover could not be turned into *assumpsit*, for money had and received, until the thing converted was exchanged by the wrongdoer for money or money's worth. *McKnight v. Dunlop*, 4 Barb. 36, 42; *Harpending v. Shoemaker*, 37 Barb. 270, 291; *Osborn v. Bell*, 5 Denio, 370; *Tryon v. Baker*, 7 Lans. 511, 514; *McGoldrick v. Willits*, 52 N. Y. 614, 620. "When the tort is waived, and *assumpsit* is brought, the receipt of the money on the sale of the goods gives the cause of action." *Schroeppel v. Corning*, 6 N. Y. 107, 112. Meanwhile, however, the current doctrine was subjected to destructive criticism as well by courts as by commentators. Notes of Nicholas Hill to *Putnam v. Wise*, 1 Hill, 234, and *Berly v. Taylor*, 5 Hill, 584; 2 Greenl. Ev. § 108, note 5; *Cooley*, Torts, 95; *Hill*, Torts, 42. "A more liberal, and, we think, a more sensible, rule, is laid down by the later text writers, and sustained by many courts, to the effect that the tort may be waived, and *assumpsit* maintained, when the property taken has been converted either into money or into any other beneficial use by the wrongdoer." *Evans v. Miller*, 58 Miss. 120. "We see no reason why the right to waive the tort and maintain *assumpsit* should not be as well applicable to the

case where the defendant has actually appropriated to his own benefit and used up the plaintiff's goods himself as where he has sold them to another and received the money, though in the former case the action must be for goods sold and delivered, and not for money had and received." TALCOTT, J., in *Abbott v. Blossom*, 66 Barb. 353, 356. "If the defendant had taken the wheat tortiously, the plaintiff, according to the well-known right of election, might have brought *assumpsit* for goods sold and delivered." COWEN, J., in *Putnam v. Wise*, 1 Hill, 234, 240. "Butts has therefore an election against Collins. He can maintain trover or *assumpsit*, and in the latter action recover the value of the flannels under the common counts for money had and received, or for goods sold." MAISON, Senator, in *Butts v. Collins*, 13 Wend. 139, 154. At last, in *Hawk v. Thorn*, 54 Barb. 164, it was expressly ruled that, "where one has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value." And in *Terry v. Munger*, 121 N. Y. 161, 24 N. E. Rep. 272, the court of appeals, per PECKHAM, J., said: "The owner of personal property which has been wrongfully converted by another man, although the property is retained by the wrongdoer, may waive the tort, and sue for and recover its value, upon an implied contract of sale." The rule as thus held finds support in the adjudications of other states. *Hill v. Davies*, 3 N. H. 384; *Stockett v. Watkins*, 2 Gill & J. 326, 342, 343; *Halleck v. Mixer*, 16 Cal. 574; *Fratt v. Clark*, 12 Cal. 89; *Barker v. Cory*, 15 Ohio, 9. It is commended, however, to acceptance by the analogies of the law and the interests of justice. A consent induced by fraud is no consent; and yet the vendor in a fraudulent sale may waive the tort, and sue for goods sold. It is conceded that upon a conversion, if the goods be parted with by the wrongdoer, he may be held as for money had and received; his promise to pay being arbitrarily forced upon him by implication of law. So, if he retain the goods, the owner should be allowed to treat the transaction as a sale, and the law should imply a promise to pay their value. In such case the tortfeasor will not be allowed to set up his own wrongful intent, in disavowal of the implied promise which the law would otherwise raise against him. *Hill v. Perrott*, 3 Taunt. 274, 275; *Lightly v. Clouston*, 1 Taunt. 112, 114, per MANSFIELD, C. J. The rule is advantageous to a defendant, since, being sued on contract instead of in tort, he is exempt from arrest, and may plead an offset. "No party is bound to sue in tort when, by converting the action into an action on contract, he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because the form of action lets in a set-off, and enables him to pay money into court." TINDAL, C. J., in *Young v. Marshall*, 8 Bing. 43. Finally, by converting the tort into a contract, and so opening the case to a counterclaim, all the controversies between the parties may be adjusted in a single litigation. The conclusion is that the defendants had an option

to waive the conversion, and to claim as for goods sold and delivered, and that, by their answer, they elected to proceed upon contract. The result is that the counterclaim is valid, and the judgment overruling it erroneous. Judgment reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.¹

FERGUSON AND ANOTHER v. CARRINGTON.

KING'S BENCH, 1829.

[9 *Barnewall & Creswell*, 59.]

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Lord TENTERDEN, C. J., at the London sittings after last term, it appeared that the plaintiffs, between the 29th of March and the 12th of May, 1828, sold to the defendant various quantities of goods, amounting in the whole to £282, which, by the contract of sale, were to be paid for by bills accepted by the defendant; and that such acceptances were given, but had not become due at the time when the action was commenced. It appeared further, that the defendant immediately after receiving the goods, sold them at reduced prices to other persons. It was contended, under these circumstances, that it was manifest that the defendant purchased the goods with the preconceived design of not paying for them; and that, as he had sold them, the plaintiffs might maintain an action to recover the value though the bills were not due. Lord TENTERDEN, C. J., was of opinion, that if the defendant had obtained the goods with a preconceived design of not paying for them, no property passed to him by the contract of sale, and that it was competent to the plaintiffs to have brought trover, and to have treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them; but that the plaintiffs by bringing assumpsit had affirmed that, at the time of the action brought, there was a contract existing between them and the defendant. The only contract proved was a sale of goods on credit. The time of credit had not expired, and consequently the action was brought too soon.

F. Pollock now moved for a new trial, and contended, that the plaintiffs might sue for the price of the goods without waiting until the expiration of the credit given; that credit having been obtained in pursuance of a fraudulent design to cheat the plaintiffs.

BAYLEY, J. The plaintiffs have affirmed the contract by bringing this action. The contract proved was a sale on credit, and where there is an express contract, the law will not imply one.

¹And see the excellent case of *Abbott v. Blossom* (1873) 66 Barb. 353, referred to in principal case.

See also, *Pomeroy's Code Remedies* (3d ed.) 653, 654.—Ed.

LITLEDALE, J. At the time when this action was brought, the defendant was not bound by the contract between him and the plaintiffs to pay for the goods. The plaintiffs claim to recover for breach of the contract.

PARKE, J. As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action, they affirm the contract made between them and the defendant.¹

ROTH AND OTHERS v. PALMER.

TOBEY AND OTHERS v. PALMER.

SUPREME COURT OF NEW YORK, 1858.

[27 *Barbour*, 652.]

By the Court, HOGBOOM, J. The complaints in these actions contain two or more counts confessedly on contract and well pleaded, and another count which sets forth, substantially, that the plaintiffs sold and delivered to the defendant goods to a certain amount, on a credit of six months; that the defendant was insolvent at the time of the said sales, and purchased said goods without any intent to pay for them and with intent to defraud the plaintiffs of their value; and that by reason of said fraud the defendant became liable to pay for the goods immediately upon their delivery. They therefore (the goods not having been paid for) demand judgment for the amount of said sales, with interest. The action is brought before the expiration of the time of credit. The defendant demurs, for the joinder of improper causes of action in one complaint, and for the want of any sufficient cause of action being set forth in the last count. The judge at special term held the complaint good, and the defendant appeals from his order to the general term.

To avoid the objections presented by the demurrer, the plaintiffs must satisfy the court, 1. That the cause of action set forth in the last count of the complaint is *upon contract*. 2. That *fraud* is sufficiently set forth therein to justify a rescission of the contract. 3. That no specific act on the part of the plaintiffs, other than bringing this action, was necessary to be done to manifest the plaintiff's intent to rescind the contract. 4. That the facts justify the plaintiffs in making their election to sue in *assumpsit* rather than *tort*. 5. That in making such election they do not thereby adopt the express contract, but rely on the

¹The following *nisi prius* decisions of EYRE and KENYON, C. JJ., were contra: *De Symons v. Minchwich* (1795) 1 Esp. 430; *Hogan v. Shee* (1796) 1 *id.* 522.—Ed.

implied contract to pay, arising from the delivery and the defendant's possession of the goods.

1. I think the plaintiffs meant to bring their action upon contract, and that the terms employed favor the conclusion that the count is on *contract*, rather than in *tort*. It alleges a sale and delivery of the goods, a fraud simply to avoid the term of credit, a liability to *pay* for the same upon delivery, and a demand of judgment for the price or value, with *interest* from the time of delivery. The words bear that construction rather than the other; and perhaps some significance should be given to the fact that the other causes of action are plainly upon contract, and that the pleader could scarcely have intended to couple inconsistent causes of action in the same complaint.

2. The count also alleges, in effect, a *fraudulent* purchase; an intent *not to pay* when the purchase was made; and a design then formed to *cheat* the plaintiffs out of the value of the goods. If such an intent is established by sufficient evidence, it will justify a rescission of the contract, and would have authorized an action of replevin, or of trover, for the goods. *Cary v. Hotailing*, 1 Hill, 311; *Ash v. Putnam*, *id.* 302; *Root v. French*, 13 Wend. 570.

3. As the plaintiffs had received nothing from the defendant on the purchase, except a worthless verbal promise, there was nothing which they were bound to return as a condition precedent to the right to recover. If they had received a note, or goods, or part payment in money, they would probably have been obliged promptly on discovery of the fraud to restore everything which they had received under the repudiated contract. *Masson v. Bovet*, 1 Denio, 69; *Boughton v. Bruce*, 20 Wend. 34; *Wheaton v. Baker*, 14 Barb. 594. But I do not see what they could possibly do in this case previous to bringing the action, to manifest their intent to rescind, unless it was to *give notice* to the defendant. I think that was not necessary. If the action had been in tort, and the original purchase fraudulent, and the possession of the defendant consequently wrongful, an action of replevin or of tort would have lain, without any demand or notice. *Colville v. Besly*, 2 Den. 139; *Hawkins v. Appleby*, 2 Sandf. 421; *Ash v. Putnam*, 1 Hill. 302. And it is difficult to see why it should any more be required simply because, not the facts, but the form of action is changed. The defendant cannot complain, because he is supposed to know that his fraud avoids the express contract, and makes him, by implication of law, liable to pay immediately upon delivery of the goods. See also *Des Arts v. Leggett*, 16 N. Y. Rep. 582.

4. Nor do I see how, after the repeated adjudications of this court on the question, it is possible to say that the plaintiffs, on repudiating the contract for the fraud, had not their election between contract and tort, as to the form of action. It is a question of form and not of substance. The adoption of the *ex contractu* form of action is in every respect more favorable to the defendant. It prevents a preliminary

arrest; it allows a set-off; it defeats final process against the body. Our courts hold that he shall not be permitted to take advantage of his own wrong to set up a formal objection against the plaintiff's recovery. Originally, and particularly in the English courts, and in Massachusetts, a distinction was attempted to be established as to the cases in which the plaintiff should be allowed his election, and to confine it to cases where the fraudulent purchaser had parted with the goods and received money on his sale of the same, which the courts allowed the plaintiffs to treat as money had and received to the plaintiff's use. *Bennett v. Francis*, 2 Bos. & Pull. 550, 555; *Jones v. Hoar*, 5 Pick. 285.

But the cases in our own courts recognize no such distinction. They seem to allow it to be done in all cases where the plaintiff would have been allowed to pursue his remedy in tort, and the decisions in this court have been too numerous and too uniform to allow us now to set up any distinction or limitation, even if it were desirable on principle. *Putnam v. Wise*, 1 Hill, 234 and note; *Cummings v. Vorce*, 3 *id.* 283 and note; *Berly v. Taylor*, 5 *id.* 577; *Brownell v. Flagler*, 5 *id.* 282; *Baker v. Robbins*, 2 Denio, 136; *Osborn v. Bell*, 5 *id.* 370; *Camp v. Pulver*, 5 Barb. 91; *Hinds v. Tweddle*, 7 Howard, 278; *Butts v. Collins*, 13 Wend. 154. See also *Lightly v. Clouston*, 1 Taunt. 113; *Hill v. Jerrott*, 3 *id.* 274; *Young v. Marshall*, 8 Bing. 43. There is scarcely a case in this state which holds a contrary doctrine. The only one that has been presented to my notice in conflict with these is that of *Moffatt v. Wood & Fry*, appended to the defendant's points but not reported. I think we must regard this last case as a departure from the line of authority established by our own courts, and therefore not to be followed. The case of *Moffatt v. Wood* went up to the Court of Appeals and was affirmed. I have not had access to the opinions pronounced upon such affirmance, but the note of the decision contained in the supplement to *Clinton's Digest*, page 24, would lead to the conclusion that the affirmance was placed upon a different ground, as it well might be, to wit, that there being an express *valid* contract in the case, the plaintiff could not be permitted to repudiate it, nor would the law *imply* a different one. The suit was *indebitatus assumpsit* for goods sold, and the goods received by the defendants were received upon a contract to *sell them on commission*. There was an alleged *subsequent fraudulent* conversion of the goods; and this fraud, under the authorities, justified the plaintiffs in disregarding the sale made by the defendants to other parties, which was in effect a fraudulent conversion, but not in disaffirming the original contract, which was subject to no imputation of fraud. There is nothing in the case to show that an action for a breach of the contract to sell on commission, if a breach of that contract had been prosecuted for and proved, would not have been sustained.

5. The remaining question is, what is the effect of a waiver of the

tort? Does it restore the express contract which has been repudiated for the fraud; or does it leave the parties in the same condition as if no express contract had been made, to such relations as result by implication of law, from the delivery of the goods by the plaintiffs, and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the various acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from a delivery and possession of the goods. *Willson v. Force*, 6 John. 110; *Butts v. Collins*, 13 Wend. 154; *Camp v. Pulver*, 5 Barb. 91. Indeed I think the plaintiff might properly and preferably have prosecuted simply for goods sold and delivered, and allowed the rest of the transaction to come out as a matter of evidence. If he had done so, the order of proof would have been as follows. The plaintiffs would have proved that they delivered goods of a certain value to the defendant, and that the latter received the same or that they were afterwards shown to be in his possession. From this evidence the law would imply a promise to pay the value, and the plaintiffs might properly have rested. The defendant would then have shown the express contract by which he was to have a credit of six months on the purchase. This would have established a defence. The plaintiffs would then show by the declaration of the defendant antecedent or subsequent to the purchase, or by other proper evidence, that the defendant's purchase was fraudulent, without means or intent to pay for the goods, and with the design to defraud the plaintiff, and would properly claim that this justified him in repudiating the contract. On this evidence the plaintiff would rest and the proof would be closed. The only remaining questions would be questions of law; whether this state of facts justified him in prosecuting in *assumpsit*, and whether adopting that form of action would reinstate the express contract. These questions, as already suggested, ought, I think, to be decided in favor of the plaintiffs. Under the old form of pleading, they might readily be prosecuted by declaration, plea and replication, and a demurrer to the replication; under the new form of pleading by a complaint and answer: the answer setting up the express contract, and the remaining facts being presented on the trial by denial or avoidance of the facts set up in the answer. The plaintiffs have chosen, perhaps in stricter analogy to the theory of the present system of pleading, to present all the facts in their complaint. The defendant admits those facts by the demurrer, and presents the questions of law arising thereon for the adjudication of the court. The result is, I think, that the plaintiffs must have judgment, and that the order of the special term must be affirmed with costs.¹

¹Accord: *Willson v. Force* (1810) 6 Johns. 110; *Weigand v. Sichel* (1866) 4 Abb. Ap. Dec. 592; *Baker v. Robbins* (1846) 2 Den. 136, but see *Nichols v. Michael* (1861) 23 N. Y. 265; *Barrett v. Koella* (1857) 5 Biss. 40.—Ed.

ELIZABETH KIRKMAN, EX'X v. THOS. PHILIPS'S HEIRS.

SUPREME COURT OF TENNESSEE, 1872.

[7 *Heiskell*, 222.]

NICHOLSON, C. J., delivered the opinion of the court.

Elizabeth Kirkman, as executrix, on the 18th of June, 1870, filed her attachment bill against the heirs and devisees of Thomas Philips, citizens of Ohio, to recover the value of certain machinery, iron, etc., alleged to have been tortiously taken in 1863 or 1864 by one Gibson, by him conveyed to Cincinnati, Ohio, and there delivered to one Moore, and by Moore sold to Thomas Philips and his son, George Philips.

The property so taken and converted by Gibson, Moore, and Philips, is alleged to have been worth twelve or fifteen thousand dollars. Philips has died testate, and his devisees are made defendants. Lands in Stewart county belonging to the devisees of Philips have been attached, and the bill prays that they may be sold, and the proceeds applied in satisfaction of the debt due the complainant for the machinery, iron, etc., so converted by Philips.

The bill was dismissed by the Chancellor upon demurrer, the cause of demurrer being that the recovery sought by the bill being for a tort, the same was barred by the statute of limitation of three years.

The allegations of the bill make a case of tort in the taking of the machinery and iron, and a conversion by Moore and Philips, but they show clearly that complainant is seeking to recover the value of the property, and not the property itself, or damages for the tort or conversion. The value so sought to be recovered is claimed to be a debt due from Philips originally, and now from the devisees of Philips, who is charged with the last conversion. The bill is therefore maintainable, the tort being, by force of the language of the bill waived, and the value of the property claimed as a debt. *Alsbrooks v. Hathaway*, 3 Sneed, 454; *Campbell v. Reeves*, 3 Head, 228; *Bennett v. Kennedy*, *ib.* 675. Although there are many authorities in other States holding that it is only after property has been converted into money that the tort can be waived, and an action for the money maintained, yet in our own State the doctrine is fully settled, that in a case of conversion the complainant has an election to insist either upon damages for the conversion, or to waive these and sue for the value of the property. If the original owner of the property elect to sue for the property, or for damages for the conversion, the action will be barred by the statute of three years: Code, sec. 2773. But if the party elects to sue for the value of the property, the action will be barred in six years: Code, sec. 2775. It is true, as argued, that a wrongdoer may obtain a title to the property by three years' adverse possession, and

yet be liable for three years after his title is perfected to pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for property or its value. During six years his right to sue for the value is as perfect as his right to sue for the property within three years. This right is not interfered with by the provisions of the Code abolishing the distinctions in the forms of actions. The statute of limitations applicable to the cause depends upon the nature and character of the action, and not upon its form. In the case before us, the complainant has elected to waive the tort and to sue for the value of the property converted, and in so doing he is entitled to the benefit of the six years statute. It does not appear on the face of the bill that six years have elapsed from the time of the purchase of the property by Philips until the filing of the bill.

The demurrer was therefore erroneously sustained.

The decree sustaining the demurrer and dismissing the bill is reversed with costs, and the cause remanded for answer and further proceedings.¹

THE WESTERN ASSURANCE COMPANY v. TOWLE.

SUPREME COURT OF WISCONSIN, 1886.

[65 Wisconsin, 247.]

TAYLOR, J.² This action was brought by the insurance company to recover from the appellant and Swan about \$1,000, which the company had paid to them upon a policy of fire insurance issued by said company to Towle & Swan as partners, upon an alleged loss by fire of property covered by said policy. The complaint charges that the payment of the \$1,000 was procured by the defendants from the company by making false and fraudulent proofs of loss and by false swearing on the part of the defendants, Towle & Swan, as to the extent of their losses; and that, relying upon such false statements and proofs of loss, and not knowing of their falsity at the time, the plaintiff paid the \$1,000 to the defendants; that afterwards, upon ascertaining the falsity of their statements and proofs of loss, and that they did not in fact sustain the losses claimed by them, and that there was in fact but a

¹For the doctrine that the tortfeasor by expiration of statutory period of limitation obtains adverse title to the chattel so that his disposition of the property thereafter passes an indefeasible title, see *Currier v. Studley* (1893) 159 Mass. 17, 22, and authorities there cited.

And see Mr. Ames' article on "The Disseisin of Chattels" in 3 Harv. Law Rev. 321, 322.—Ed.

²Facts omitted and only that portion of the opinion is printed relating to the measure of the recovery.—Ed.

very small portion of said \$1,000 due to them for losses under said policy, the plaintiff demanded of said defendants the \$1,000 so paid to them by reason of said false and untrue proofs of loss and fraudulent representations; that the defendants have neglected and refused to pay the same. Judgment is demanded for the said sum of \$1,000 with interest from the 27th day of September, 1881, that being the date of the payment thereof to them by the company. The first complaint filed in the action was demurred to as not stating a cause of action; and thereupon the plaintiff filed an amended complaint, to which the defendant *Towle* answered, and Swan suffered a default. For the details of these complaints a reference must be had to the printed case.

After the summons was served, and before any complaint in the action was made or served upon the defendants, or either of them, the plaintiff procured to be made a sufficient affidavit for a writ of attachment against the property of the defendants, and upon such writ the property of the defendant *Towle* was attached. *Towle* thereupon, and before the service of any complaint in the action, gave an undertaking, as authorized by sec. 2742, R. S., conditioned as therein required, and the property attached was released from said attachment.

When the action was called for trial, and a jury impaneled to try the cause, the defendant *Towle* moved to dismiss the amended complaint and strike it from the files, for the reason that the action was begun as upon a contract and the amended complaint sounds in tort. This motion was overruled, and defendant excepted. The defendant then objected to the reception of any evidence under the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was also overruled, and defendant excepted. After trial the plaintiff had a verdict in its favor for \$1,205.36, upon which judgment was rendered against both defendants. *Towle* alone appeals from the judgment. The verdict was the amount paid by the company to the defendants on the 27th of September, 1881, with interest from that date to the date of the verdict, and no more.

This action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations were made by the defendants in order to induce the plaintiff to pay the same. This was so expressly held in *Northwestern Life Ins. Co. v. Elliott*, 10 Ins. Law J. 333; S. C. 5 Fed. Rep. 225. In that case the policy upon which the money had been paid was void and illegal under the laws of Oregon. Still the company had paid the loss on the false claim of the death of the party whose life was insured. It was afterwards ascertained that the person whose life was insured was not dead, and the company thereupon brought an action to recover the money paid. It was insisted on the trial that the claim for the money was founded on

the void and illegal contract of insurance, and for that reason no recovery could be had. Judge DEADY, in deciding the case, says (5 Fed. Rep. 229, 230): "True, the plaintiff might, at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to plaintiff's use; and the law, in the interest of justice, and by way of promoting the remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect in affirmance of its validity, but only an implication or fiction of law that upon the facts—the plaintiff being entitled *ex æquo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same." *Catts v. Phalen*, 2 How. 376, holds the same doctrine.

The plaintiff in the case at bar, in order to avail itself of the right to sue out an attachment in this action, elected to waive the action for the wrong committed by the defendants, and bring its action for money had and received to its use, upon the implied *assumpsit* to repay the same. In this action it recovers the money, if it recovers at all, on the ground that it has paid for a loss which did not in fact occur. If the loss did in fact occur to the extent of the payment made, then in equity and good conscience the money ought not to be refunded, and no promise to refund the same could be presumed in favor of the plaintiff; and if there was a loss, though not as great as the money paid, and the excess of payment was made on account of the fraud of defendants, as to such excess there would arise an implied promise on the part of the defendants to refund the excess. The fraud consists in falsely overestimating the claim, and demanding and receiving the excess beyond the actual loss, and not in receiving the money which was justly due for a real loss sustained. We think, therefore, that this action for money had and received, which has always been considered an action at law which is maintainable upon equitable principles, can only avail the plaintiff for the purpose of recovering what it has paid in excess of the real loss, if any, which was sustained by the defendants, unless the jury should find that the fire which destroyed the property was caused, either directly or indirectly, by the wrongful acts of the defendants, or one of them. If the latter fact was made to appear, there would be no loss under the policy which the plaintiff ought to pay. If, on the other hand, there was in fact an honest loss under the policy, and the plaintiff has paid more than such honest loss by reason of the fraud of defendants, that fact does not entitle the plaintiff to recover back in this action the amount of money which is covered by the honest loss.

The only case we have found which would seem to question the soundness of the conclusions we have arrived at upon the question of the amount the plaintiff ought to recover in this action, if there was an honest loss, is *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass.

221. This was, however, an action of tort to recover money obtained by false representations, upon an insurance of live-stock. There were two points in the case: first, that there were false representations made at the time of procuring the policy, which rendered it void; and similar false representations made in making proofs of loss, upon which the money was paid. The case was, however, disposed of in favor of the insured and against the company upon another point not involving the question as to the amount which the company ought to recover in case a recovery was had by it.

The complaint of the plaintiff admits that some of the property burned was covered by the policy, and the proofs show the same fact; so that there was something due the defendants from the plaintiff upon the policy, after the fire took place, unless they wrongfully caused the fire; and in determining the amount the plaintiff ought to recover, the amount of such actual loss should have been considered, if they were entitled to recover at all on the ground of fraudulent representations as to the amount of the actual loss sustained. The learned circuit judge instructed the jury that if they found from the evidence that the loss of defendants was small, and materially less than the amount of the policies of insurance, and that the defendants knew that fact when they made their proofs of loss, and intentionally and knowingly stated the amount of the loss to be materially greater than they knew it to be, for the purpose of unjustly procuring from the plaintiff more than the amount of the loss, and the plaintiff paid the loss relying upon such proofs and in ignorance of its falsity, then the jury should find a verdict for the plaintiff for the full sum paid by it, with interest from the date of payment. This instruction was excepted to by the defendant *Towle*. As stated above, this instruction was erroneous, and did not state the true rule for establishing the amount the plaintiff should recover in this action upon that branch of the case. As there was only a general verdict in the case, we cannot determine that the verdict was not based upon the fact that there was a fraudulent overvaluation of the amount of the losses of the defendants. This erroneous charge may have induced the jury to render a verdict for the whole sum paid by the plaintiff, notwithstanding they found in favor of the defendant *Towle* on the charge that the fire was wrongfully set by the defendants, or one of them.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied February 23, 1886.

ASHER v. WALLIS.

KING'S BENCH, 1708.

[11 *Modern Reports*, 146.¹]

A MAN having a wife in England goes to Jamaica, and there marries a rich woman, and lets her lands, reserving rent to himself. and receives the same divers years; but after some time, they both coming into England, she perceived that he had another wife living: and thereupon brings an indebitatus assumpsit against him for the said rents, as so much money received by him to her use.

At the trial at GUILDHALL, *London*, this point was saved to be argued by Counsel, Whether an *indebitatus assumpsit* would lie in this case? which was argued this Term.

DEE, *the Common Serjeant*, said, It was like the case of a *disseisee*, who could not maintain an *indebitatus assumpsit* against the *disseisor*, as for money received to his use; and in this case there was another and a proper action; for if the rents were received with her consent, she might have an action of account against him as *receiver*;² if without her assent, trespass lies.

¹The principal case is reported more briefly under the name of *Hasser v. Wallis* in 1 Salk. 28, from which report the following is taken:

"Upon this the plaintiff, discovering the former marriage, brought an *indebitatus assumpsit* against Wallis for so much money received to her use. And after verdict on *non assumpsit*, it was objected, that Wallis having no right to receive, the tenant was not discharged, and therefore an action lay against the tenant, who has his remedy over against Wallis. But the court held Wallis was visibly a husband, and the tenant discharged; at least that the recovery against Wallis in this action would discharge the tenant, for this would be a satisfaction to the lessor."

And see the valuable note on money had and received appended to this case in Evans' Edition of Salkeld.

On the effect of payment operating as extinguishment of tenant's rents, that is extinguishment of a debt, see *Dumois v. Still* (1895) 32 N. Y. Supp. 164; *Sergeant v. Stryker* (1838) 1 Harr. 464, in which the principal case is discussed.

Accord in Chancery: *Hele v. Stowel* (1670) Ch. Cas. 126; *In re Bowes* (1887) L. R. 37 Ch. D. 128. See also *Mercantile Co-op. Bank v. Frost* (1898) 62 N. J. 476.

²In *Tottenham v. Bedingfield* (1573) 2 Leon. 25; Ow. 35, 83; Dal. 99, "the case was, the plaintiff had a lease of a parsonage, and the defendant being no lessee, nor claiming any interest, takes the tithes being set forth, and carries them away, if the plaintiff could have this action was the question." The defendant pleaded he was never his "bailly for to render account." The court held the action not maintainable because the action of an account presupposed a privity based upon fiduciary relationship as in the case of a

EYRE *also for the defendant* said, that an *indebitatus assumpsit* will not lie, but where money is due on some *contract*; therefore where one man enters on another, and sells his goods, &c. he who has the property in them cannot have an *indebitatus assumpsit* for the money received, as for money received to his use; but must have his action as for a wrong done, *viz.* trespass, assize, &c.

WHITACRE *for the plaintiff* said, that the action lies; for the plaintiff was consenting, and often present when the money was paid; that where *debt* will lie, an *indebitatus assumpsit* will also lie¹ in many cases, so not confined to a particular action. But here it cannot be said, that the defendant was a wrong-doer, because it was done with her consent: besides, an *indebitatus assumpsit* will lie, though there was no contract; as for the profits of an office wrongfully received, though received by one who pretended a title.²

proctor, a bailiff or a receiver, whereas the defendant was a tortfeasor and "wrongs are always done without privity." It was admitted, however, that if the defendant had received plaintiff's rents, then upon ratification, the action would have lain.—ED.

¹See Slade's Case, 4. Co. 92.

²See the Case of the City of London, 9. Co. . See also Sir William Saunderson v. Bignal, 2 Stra. 747; Duppa v. Gerrard, Salk. 78; Stockhold v. Collington, Salk. 330.

In Arris v. Stuckley (1678) 2 Mod. 260, it was held *inter alia* that "If a man received the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use."

In the course of the argument it was said by counsel: "For where one receives my rent, I may charge him as bailiff or receiver; or if any one receive my money without my order, though it is a *tort*, yet an *indebitatus* will lie, because by reason of the money the law creates a promise: and the action is not grounded on the *tort*, but on the receipt of profits in this case." To which the court answered: "An *indebitatus assumpsit* will lie for rent received by one who pretends a title; for in such case an account will lie. Wherever the plaintiff may have an account, an *indebitatus* will lie." This was new doctrine, but was expressly followed as a precedent in Howard v. Wood (1679) 2 Lev. 245, T. Jones, 126, 2 Show. 23, although the court, per Scroggs, C. J., said: "If this were now an original case, we are agreed it would by no means lie." As reported by T. Jones, 126, 128: "But it was resolved that the action lay, for it is an expeditious remedy, and facilitates the recovery of just rights."

affirm against As late as 1697, HOLT, C. J., was loath to allow *indebitatus* for fees, but admitted the action lay. Constable's Case (1697) Comb. 446; Kessel v. Zeiser (1886) 102 N. Y. 114; Kreitz v. Behrensmeyer (1894) 149 Ill. 496; Nichols v. MacLean (1886) 101 N. Y. 526; Fitzsimmons v. Brooklyn (1886) 102 N. Y. 536 (one wrongfully deprived of an office is entitled to full salary, although while ousted he earned other money); U. S. v. Addison (1867) 6 Wall. 291; Crosbie v. Harley (1833) Ale. & N. 431; contra, Stuhr. v. Curran (1882) 44 N. J. L. 181 (but see C. J. BEASLEY's admirable dissenting opinion).

While therefore it is established by authority that fees of an office may be

DARNEL *also for the plaintiff*, that there is no need of a contract to maintain an *indebitatus assumpsit*;¹ for where money is overpaid, this action will lie for the surplus.² If the wife lend her husband's money to J. S. the husband may have either *indebitatus assumpsit* (or *trover*. Q.). If rents are received by *false tokens*, either *account* or *indebitatus assumpsit* lies.³

And BY THE WHOLE COURT it was agreed, that an *indebitatus assumpsit* would well lie.

But HOLT, *Chief Justice*, said, that *trover* would not lie in this case, because she was never possessed of the money;⁴ and when she married the defendant, she consented that he should manage her estate. He cited a case, where if money be over-paid, either *debt* or *indebitatus assumpsit* lies.⁵ If two lay a wager, and stake down the money, the winner shall have an *indebitatus assumpsit* against him that holds the stakes, as for money received to his use.⁶

And the judgment was given for the plaintiff.⁷

recovered in this action, it is equally well settled that only the fees or perquisites incident to the office, not gratuities may be recovered, unless such fees or perquisites be known and customary. *Boyter v. Dodsworth* (1796) 6 T. R. 681.—Ed.

¹3 Mod. 260.

²See *Moses v. Macfarlane*, 2. Burr. 1012; *Grove v. Dubois*, 1. Term Rep. 112; *Bize v. Dixon*, 1. Term Rep. 281; *Robinson v. Eaton*, 1. Term Rep. 59; *Clark v. Shee*, Cowp. 197.

³See *Whip v. Thomas*, Bull. N. P. 130; *Clark v. Shee*, Cowp. 197.

⁴*Blackham's Case*, Salk. 290.

⁵1. Co.

⁶See *Bovey v. Castlemain*, 1 Ld. Raym. 69; *Hard's Case*, Salk. 23; *Jones v. Randal*, Cowp. 37.—Reporter's note.

⁷See *Mayor v. Saunders* (1832) 3 B. & A. 411, for the case of stallage or tolls. If, however, the defendant claims adverse title to the land or fund in question the presumption of agency is overthrown and a recovery in *assumpsit* is not allowed, as in *Clarence v. Marshall* (1834) 2 C. & M. 495 (following in this respect *Tottenham v. Bedingfield* (1573) Ow. 35, 83, in note *ante*).

See also *Nolan v. Manton* (1884) 46 N. J. L. 231; *Brown v. Brown* (1886) 40 Hun, 418; *Fowler v. Bowery Savings Bank* (1889) 113 N. Y. 450; *Casey v. Pilkington* (1903) 83 App. Div. (N. Y.) 91, 93; *Butterworth v. Gould* (1869) 41 N. Y. 450; *Foley v. Mutual Life Ins. Co.* (1892) 18 N. Y. Supp. 615; *Webb v. Meyers* (1892) 18 N. Y. Supp. 711; *Murphy v. Ball* (1862) 38 Barb. 262.—Ed.

CURTEIS v. BRIDGES.

TRINITY. KING'S BENCH, 1697.

[*Comberbach*, 450.]

IF the Master of one Ship takes a Servant that belongs to the Master of another Ship, whatsoever Wages he receives from the King upon his Account, shall be to the Use of his first Master, being acquired by the Labour and Industry of his Servant.¹

BARBER v. DENNIS.

TRINITY. QUEEN'S BENCH, 1704.

[1 *Salkeld*, 68.²]

A WATERMAN'S widow took an apprentice, who went to sea and earned two tickets, which came to the defendant's hands. The widow brought trover for the tickets, and had judgment; for what the apprentice gains, he gains to his master; and whether legally apprentice or not, is no ways material, for it is enough if he be so *de facto*.

EADES v. VANDEPUT.

GUILDHALL, KING'S BENCH, 1785.

[5 *East*, 39 a, 39.]

THIS was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the Defendant's ship. The only witness to charge Captain *Vandeput* with knowledge was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship he told the Defendant, the captain, that he was an apprentice, and required his discharge, which was refused. The Plaintiff having recovered a verdict before BULLER, J., at the sittings after the last term at *Guildhall*.

¹In the earlier case, *Anonymous* (1695) *Skin.* 579, *HOLT*, C. J., held that an action on the case for money received by the defendant lay under like circumstances.—ED.

²Likewise reported in 6 *Mod.* 69, where the opinion is ascribed to *HOLT*, C. J.—ED.

Erskine moved for a new trial, grounded on affidavits of Captains *Vandeput* and *Ommaney* of the navy, which stated that, according to the custom of the navy, if an apprentice be pressed he must send his indentures to the Admiralty, or bring evidence of them to the captain of the vessel on board of which he is taken. And here he observed that the boy had never shewn his indentures; and that if a captain were to discharge a boy on his bare word that he was an apprentice, every boy on board his ship when he was tired of the service would make that excuse.

The Court, however, were of opinion that the evidence was sufficient, and that the captain ought to have made inquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced the Defendant would have been bound to have discharged the boy.

Rule refused.

LIGHTLY v. CLOUSTON.

COMMON PLEAS, 1808.

[1 *Taunton*, 112.]

THIS was an action of *indebitatus assumpsit* “for work and labor performed for the defendant at his request, by one Thomas Sinclair, the apprentice of the plaintiff legally bound to him by indenture for a term of years, at the time of the work and labor so performed existing and unexpired, and to the profits and receipts of whose work and labor, the plaintiff was, as the master of the said apprentice, by law entitled.” The defendant seduced the apprentice from on board the plaintiff’s ship in Jamaica, and employed him as a mariner to assist in navigating his own ship from Port Royal, home. The cause was tried at the sittings after Trinity term last, before MANSFIELD, C. J. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following objection, namely, that the plaintiff ought to have declared in a special action on the case, and that *indebitatus assumpsit* would not lie.

Accordingly *Best*, Serjt., having on a former day obtained a rule *nisi* for setting aside the verdict and entering a nonsuit.

Shepherd, Serjt., now showed cause. It has been decided that this declaration is good, in the case of *Eades v. Vandeput*, 5 East, 39, which was an action brought expressly for the wages earned by the plaintiff’s apprentice, who had been improperly impressed, and compelled to serve on board a ship of war; and the court there held that the plaintiff might recover. *Barber v. Dennis*, 1 Salk. 68. The widow of a waterman was held to be entitled to two tickets which had been earned by her apprentice during his service at sea. In *Smith v.*

Hodson, 4 T. R. 217, the court expressly determined, that although trover would have lain for the goods, yet the assignees might affirm the fraudulent contract of the bankrupt, and recover the price as upon a sale made by themselves.

Best, Serjt., contra. The case of Eades v. Vandeput, as it is now stated, cannot be law. An action might perhaps have been maintained in that case to recover the wages in the shape of damages for the tort; but all the work and labor which the apprentice there did must have been done for the king; since even the services of such servants as are allowed to the captain of a king's ship are wholly gratuitous to him. And if the apprentice worked for the king, that action could not be maintained against the captain. Macbeath v. Haldimand. 1 T. R. 172. Barber v. Dennis was a case of trover, which can furnish no authority for this form of action, and it is of the less weight because one point which is there reported cannot be law, namely, that it is immaterial whether the person who performed the service was legally an apprentice or not. The analogy drawn from that class of cases, in which goods have been tortiously taken and sold, and the plaintiffs have been permitted to waive the trespass and sue for the proceeds of the sale, as money had and received to their use, is not applicable here. It is of pernicious tendency more largely to extend this form of action, in which the defendant is not apprised by the declaration of the nature of the claim that is made on him. It is necessary to preserve the distinction between causes of action which arise *ex delicto*, and those which arise *ex contractu*, or there would be no limits to the perversion that would ensue. A cause was tried before EYRE, C. J., in which the plaintiff declared in assumpsit, that the defendant undertook not to beat him in a voyage to the East Indies. EYRE, C. J., held he could not recover.

MANSFIELD, C. J. It is difficult upon principle to distinguish this case from those that have arisen on bankruptcies and executions, and in which it has been held that trover may be converted into an action for money had and received, to recover the sum produced by the sale of the goods. I should much doubt the case of Smith v. Hodson, but that I remember a case so long back as the time of Lord Chief Justice EYRE in the reign of George the Second, in which the same thing was held. I should have thought it better for the law to have kept its course; but it has now been long settled, that in cases of sale, if the plaintiff chooses to sue for the produce of that sale, he may do it; and the practice is beneficial to the defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice; that he is consequently entitled to an equivalent for that labor, which has been

bestowed in the service of the defendant. It is not competent for the defendant to answer, that he obtained that labor, not by contract with the master, but by wrong; and that, therefore, he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the defendant.

HEATH, J. So long back as the time of Charles the Second, it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received; and HOLT, C. J., held it clear law, that if a person goes and receives my rents from my tenants, I may bring my action against him for money had and received. It is for the benefit of the defendant that this form of action should be allowed to prevail, for it admits of a set-off, and deductions, which could not be allowed in an action framed on the tort.

*Rule discharged.*¹

2. ELECTION OF REMEDIES.

HITCHIN [OR KITCHEN] v. CAMPBELL.

COMMON PLEAS, 1772.

[2 *William Blackstone*, 827.²]

THIS cause proceeded to trial in the sittings after Trinity term, 1771, on the two issues joined on the first and third pleas, when this special case was stated for the opinion of the court: That Richard Anderson, being indebted to the defendant Campbell in £2000 for money lent, gave two bonds and judgment for the same; which judgment was entered up. And on the 9th March, 1769, a writ of execution was sued out and delivered to the sheriff of Surrey the same

¹In *Foster v. Stewart* (1814) 3 M. & S. 191—a case involving the same principle—the court squarely followed *Lightly v. Clouston*, *supra*, so that the doctrine of waiver may be regarded as thoroughly established in this class of cases.

See the following early cases: *Treswell v. Middleton* (1622) Cro. Jac. 653; *Parish v. Parish* (1724) 1 Str. 582; Co. Lit. 17a (Hargrave's note). Equity early recognized the legal right of the master to the services of the apprentice, and therefore refused to grant relief on a bill by the apprentice for his earnings. *Meriton v. Hornsby* (1747) 1 Ves. Sr. 48; *Hill v. Allen* (1747-8) 1 *id.* 83.

See also, *James v. Le Roy* (1810) 6 Johns. 274; *Stockett v. Watkins* (1830) 2 G. & J. 326, 343.

So in the case of an infant. *Thompson v. Howard* (1875) 31 Mich. 309; *Hopf v. U. S. Baking Co.* (1892) 27 N. Y. Supp. 217.—Ed.

²Likewise reported in 3 Wils. 304.—Ed.

day, by virtue of which the sheriff the same day levied of the goods of Anderson by making a bill of sale thereof to the defendant, to the value of £2155 6s. 5d., for debt and costs. On the 9th April, 1769, a commission of bankrupt was awarded against Anderson, and the plaintiff appointed assignee, who in Michaelmas term, 1769, brought trover in this court against the sheriff of Surrey and the defendant for the goods levied under the execution. On trial whereof in Hilary term, 1770, there was found a verdict for the defendant, and judgment accordingly. In Easter term, 1770, the plaintiff brought an action in the King's Bench against the defendant for money had and received to [his] use as assignee, and recovered £860 10s., as mentioned in the plea, upon a different cause of action from the present; namely, for certain notes delivered to the defendant after the act of bankruptcy, which was proved in the present cause to have been committed in February, 1769. It was admitted that the defendant received the money levied under the execution before the action in the King's Bench was brought. And this action being brought to recover back that money, *Qu. whether* under these circumstances they are entitled to recover?

This case was argued in last Hilary term by *Glyn* for the plaintiff, and *Jephson* for the defendant; and again in Easter term, by *Davy* for the plaintiff, and *Burland* for the defendant.

For the defendant it was insisted, 1. That this action of assumpsit would not lie, the cause of action being in the nature of a tort, and not a contract. 2. That the plaintiff, having made his election by bringing trover in the King's Bench, in which he failed, is barred thereby from bringing under another suit for the same cause of action.

For the plaintiff it was replied, 1. That general use and modern resolutions have now settled this point, and it is not to be disturbed. 2. That the plaintiff, not having had the fruit of his remedy in the King's Bench, shall not be precluded by it.

And now, in this term, DE GREY, C. J., delivered the opinion of himself, GOULD, BLACKSTONE, and NARES, JJ. The legal effect of an act of bankruptcy committed by a trader is to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission be afterwards issued. This relation takes place in every instance but three, excepted by statutes 1 Jac. 1. 21 Jac. 1, and 19 Geo. 2, c. 32. Executions are not among these excepted cases, but are expressly declared void by the statute 21 Jac. 1; the commission being in the nature of an execution for the whole body of the creditors. By the old acts of Hen. 8 and Eliz. commissioners had a power of acting themselves in recovering the bankrupt's effects. Afterwards it became the practice to assign, which is allowed by 1 Jac. 1, c. 15. It was not till the 5 Anne that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is

certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued. So ruled in *Letchmere v. Thorowgood*, in Comb. and Show., Comb. 123; 1 Show. 12; 3 Mod. 236; and in *Cooper v. Chitty*, in Burrow, 20. But by selling, the sheriff converts the goods; and then trover is maintainable against the sheriff, or his vendee, or the plaintiff in the original action. But a question was made in this cause, whether *indebitatus assumpsit* would lie against the defendant for the money arising from the goods thus taken in execution, seeing that if the debt was illegally levied it was a tort, and if the tort be waived the whole is waived; for you cannot affirm one part of a transaction and disaffirm the rest. *Wilson v. Poulter*, 2 Stra. 859. It is true, this matter was considered formerly in that light, as in *Philips v. Tompson*, 3 Lev. 191, and *Holt*, 95, 12 Mod. 324. And in *Billon v. Hyde* (well reported, 1 Ves. 326), Lord HARDWICKE said that this action was never allowed by Lord PARKER, Lord RAYMOND, or himself, but that the practice had been since altered. And practice has certainly much extended this action of assumpsit as a very useful and general remedy. The same principle which supports this action against one who receives money from the bankrupt himself will support it against another who receives it under the bankrupt. In both cases it is the property of the assignees; and though while this action was in its infancy (2 John. 126; 2 Lev. 245) the courts endeavored to find technical arguments to support it, as by a notion of privity, etc., yet that principle is too narrow to support these actions in general to the extent in which they are admitted. Besides, if it were necessary, there is in this case a privity between the defendant and the bankrupt, the judgment being voluntarily given. Another, and a much stronger objection taken, was that though the assignees may have their election to bring either an action of tort or contract, yet they cannot bring both; and having elected to bring trover, the judgment in that bars the action of assumpsit. This depends upon two considerations: 1. Whether a man's having once elected to proceed upon the tort bars him from proceeding upon the contract. 2. Whether his proceeding down to judgment does not bar him from trying the same cause of action again. 1. As to the first, cases have been cited to show that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain, or bring assize, but not both (Litt. s. 588): may bring writ of annuity, or distrain (Litt. s. 219): and his election is determined, even though he should not recover after he hath counted thereon (Co. Litt. 145a). But where both remedies are merely real or merely personal, there the election is not determined till the judgment on the merits. For a nonsuit on an action of account is no bar to an action of debt. Co. Litt. 146a. And so must *HOLT*, in 12 Mod. 324, be understood to mean. "that if they bring one they

shall not afterwards bring the other," *i.e.*, if the first be brought to a due conclusion. 2. But in the present case the action of trover went on to a verdict and judgment, and appears by the case stated to have been for the same cause of action. And upon this it is that the opinion of the court is founded. The rule of law is, *Nemo debet bis vexari pro eadem causa*.¹ And in Ferrers' case (6 Co. 7; Cro. Eliz. 668) it is held that where one is barred in any action, real or personal, by judgment or demurrer, confession, verdict, etc., he is barred as to that, or the like action of the like nature for the same thing, forever. In personal actions the bar is universal; upon real actions he may have an action of a higher nature. But a bar in one assize, etc., is a bar in every other. Here, by "actions of the like nature" must be meant actions in a similar degree, not merely those which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar. 5 Co. 61, Sparry's case, gives the history of this rule, and shows when it commenced, its progress, and legal distinctions. There are many exceptions to this rule: as, where the first action is not competent; where the plaintiff has mistaken his character, and sued as executor, not as administrator; or where the judgment is given for faults in the declaration or pleadings. 1 Mod. 207. But the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions. Putt *v.* Royston, 2 Show. 211; Raym. 472; 3 Mod. 1; Pollexfen, 634; Mortimer *v.* Wingate, Moor, 463; Bro. Acton on the Case, pp. 97, 105. These relate to the whole of the demand. But the same reasoning extends to part of it only; as 4 Co. 92 *b*, Slade's Case; and Pike *v.* Aldworth, in Scacch., T. 5 W. & M., and Hil. 7 & 8 W. 3. In the present case, as there was clearly a conversion before the action of trover, the only question could be on the property. In this second action of assumpsit there arises the same question of property. The first action has determined the goods not to be the assignee's. He shall not now try whether the money produced by those goods is his or no. On the state of the case therefore now found, the court think the former action a bar.

When this case was first before the court on demurrer, there were not sufficient averments to support the plea in bar. Though the goods were averred to be the same, it did not appear that the question was the same; and therefore trover might not have lain for the goods themselves, though *indebitatus assumpsit* might afterwards lie for the value. Nor is there any injustice in the present case. The money is in the hands of a *bona fide* creditor, who has got an advantage at law,

¹On this point see an article by Mr. Ames on the Disseisin of Chattels, 3 Harv. L. R. 326-328.—Ed.

by his diligence, over the body of the creditors; and he has a right, in conscience, to keep it.

Therefore, *per tot. cur.*, *Judgment for the defendant.*

WILBUR v. GILMORE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1838.

[21 *Pickering*, 250.]

TRESPASS *quare clausum*. The action was submitted to referees, under a rule of court. They awarded to the plaintiff the sum of \$5, as the actual value of wood and timber cut and carried away by the defendant, and submitted to the determination of the Court the legal questions arising in the case.

The trespass was committed in the lifetime of the plaintiff's testator. In the year 1835, the plaintiff commenced a suit against the defendant for the same cause of action. To that suit there was a general demurrer, and joinder in the Court of Common Pleas, and judgment was there rendered that the declaration was bad and that the defendant recover his costs. The defendant insisted that those proceedings were a bar to the present action.

The present action was commenced by the executor after the Revised Statutes went into operation, and another question submitted to the Court by the referees was, whether it could be legally commenced by the executor.

MORTON, J., delivered the opinion of the Court. Two questions are referred to the Court by the report of the referees. 1. Can this action be maintained by the executor? 2. Was it barred by a former judgment between the parties?¹

2. The former judgment was rendered on a general demurrer to the declaration, and is no bar to this action.

The general rule undoubtedly is, that the judgment in one action shall bar all other suits between the same parties and for the same cause of action. *Interest reipublicæ ut sit finis litium*. But this rule is limited to judgments rendered on the merits. If the plaintiff be nonsuit for want of proof, or because his *allegata* and *probata* do not agree, or for any other cause, he may commence another action. 1 Chitty on Pl. (5th ed.) 227; Gould on Pl. 478. Even a judgment of nonsuit on the merits, or on an agreed statement of facts, has been holden to be no bar to another action. *Knox v. Waldoborough*, 5 Greenl. 185; *Bridge et al. v. Sumner*, 1 Pick. 371. So if the plaintiff mistake the form of his action, as if he bring trespass instead of trover, and his writ be adjudged bad on demurrer, the judgment will not bar an action of trover. 1 Chit. Pl. (5th ed.) 227; Gould on Pl.

¹Only the opinion of the court on the second question is given.—Ed.

478, § 46. So if the plaintiff mistake his cause of action and the defendant demur and have judgment, this will not preclude the plaintiff from commencing a fresh action, correctly setting forth the right cause. So also if the declaration be demurred to, or a bad plea be pleaded and demurred to, and a judgment be rendered against the plaintiff for the insufficiency of his declaration, it will not estop the plaintiff from bringing another action to enforce the same right; because the case as stated in the last declaration was not tried in the first. In all these cases, if the defendant plead the former judgment in bar, the plaintiff may reply that it was not obtained on the merits. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, § 45; Vin. Abr. Judgment (Q. 4); *Lampen, v. Kedgewin*, 1 Mod. 207. In this last case, NORTH, C. J., says, "there is no question but that if a man mistakes his declaration and the defendant demurs, the plaintiff may set it right in a second action."

It is apparent from the record, that the former judgment between these parties was rendered upon the insufficiency of the declaration and not upon the merits of the case, and therefore can be no bar to the present action.

Award of referees accepted.

MARSH v. PIER.

SUPREME COURT OF PENNSYLVANIA, 1833.

[4 *Rawle*, 273.]

ONE Pier owned the brig *Sally Barker*, of which one Marshall was master, and in 1828 the brig sailed from New York to Tabasco with a cargo of copper. On arrival at the port, a cargo of logwood was put on board on account of plaintiff, and the brig proceeded on the return voyage to New York. After being at sea three or four days, she became leaky and unfit to continue the voyage, whereupon the brig changed her course, and entered New Orleans, where she was regularly surveyed, condemned and sold. By direction of the master, the logwood in question was sold through W. Nott & Co., who gave the master a draft for the proceeds. The logwood was thereafter shipped to Philadelphia and sold through original purchaser to Marsh, who took *bona fide* and without notice. Pier disaffirmed the sale at New Orleans, but ultimately, in 1829, brought suit against Wm. Nott & Co. in a New York court for the proceeds of the logwood, in which suit the defendants Wm. Nott & Co. had judgment.

In 1832, Pier brought an action of replevin against Marsh in

the District Court of Philadelphia for the logwood in question, to which Marsh pleaded "property." From judgment in favor of the plaintiff in this suit Marsh appealed.¹

The opinion of the court was delivered by KENNEDY, J.²

From this exemplification of the record of the judgment of the Superior Court of the City of New York, it is manifest that the value or price of the logwood which forms the subject-matter of the dispute in this action, was a part of the claim of the plaintiff below in his suit against William Nott and John Parker in that court. They sold the logwood to Samuel P. Morgan & Co., who shipped it on board of the barque Hercules consigned to C. Price & Morgan at Philadelphia, who sold it again to the plaintiff in error.

Now, as the sale of logwood by Nott and Parker at New Orleans, when, as is admitted by both parties, it was the property of Sylvester Pier, and avowedly sold by them as such, are facts alleged and admitted on both sides in this action, it necessarily follows, that on the trial of the cause in the Superior Court of the City of New York, either the authority of Nott and Parker to make this sale, and that they had faithfully accounted to Pier for the proceeds thereof, must have been established to the conviction of the court and jury, or otherwise, if made without legal authority, that they had satisfied Pier for his claim and loss of property in the logwood, in some way, so that he was not entitled to recover of them in that action. And it appears to me, that being decided against Pier, on either of these grounds, he was thereby precluded from the further maintenance of this action. In short, I am unable to perceive any ground upon which that action could have been determined, as it appears from the exemplification of the record to have been, that would not have made it a bar to the further prosecution of this suit by him. The evidence to support both actions was the same; that being so, the cause of action must be the same, notwithstanding the actions are grounded on different writs. This was held in *Kitchen v. Campbell*, 3 Wils. Rep. 308, to be the test by which we are to ascertain whether a final determination in a former action is a bar or not to a subsequent action; and it is there said, that this principle runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrers' Case*, 6 Co. 7, "That when one is barred in any action, real or personal, by judgment upon demurrer, confession, verdict, &c., he is barred as to that, or the like action of the like nature for the same thing forever," for *expedit reipublicæ ut sit finis litium*; which is also supported by another maxim. *nemo debet bis vexari, si constet curiæ quod sit pro una et eadem*

¹A short statement of facts is substituted for that of the report.—Ed.

²A part only of the opinion is given.—Ed.

causa. Sparry's Case, 5 Co. 61. In Slade's Case, 4 Co. 946, it was held, that a judgment in an action of debt was a bar to an action of *assumpsit* brought on the same contract. In *Bardwell v. Kersey et al.*, 3 Lev. 179, it was decided that a former action of trespass by the plaintiff against the defendants was a bar to a subsequent action on the case for the same cause. Also in *Kitchen v. Campbell*, 3 Wils. 308, 309; S. C. 2 Bl. Rep. 827, it was ruled, that a judgment rendered in favour of the defendant in a former action of trover, was a bar to the plaintiff's recovery in a subsequent action of *assumpsit* for money had and received for the plaintiff's use, from a sale made of the same goods by the defendant. In like manner a judgment rendered for the defendant in trespass *de bonis asportatis*, was determined to be a bar to the plaintiff's recovery in a subsequent action of *assumpsit* to recover the money received by the defendant as the price of the same goods upon a sale made of them by him. *Rice v. King*, 7 Johns. 20. The principle settled by these, and many other cases, is, that the plaintiff cannot have a second investigation of the same original matter when it has passed once in *rem judicatam*. And this is in conformity to the rule laid down and deduced by the judges from the cases on this subject in the *Dutchess of Kingston's Case*, 20 State Trials, 535, "that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties upon the same matter directly in question in another court."

From the same cases, as well as others, it may be seen, that the plaintiff may frequently at his election bring either trespass, trover, replevin, detinue or *assumpsit*, to recover compensation for the loss of his goods. *Feltham v. Tyrrel*, Lofft's Rep. 207, 320; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Lindon v. Hooper*, Cowp. 419; 20 Vin. Abr. tit. Trespass, page 540, and the cases there referred to. And if the plaintiff elects to bring an action of trespass or trover against the defendant, who has sold his goods without authority, and obtains a judgment covering the value of the goods, the right of property in them, I take it, from the weight of the English authorities on this subject, is thereby changed from the plaintiff, so that he could not maintain an action afterwards for the goods, against the vendee of the defendant. *Brown v. Wootton*, Cro. Jac. 73, per FENNER, Justice, "the property of the goods is changed," page 74; S. C. Yelv. 67, 68, and note (1) by METCALF; Moore, 762; *Adams v. Broughton*, 2 Stran. 1078; S. C. Andr. 18; Bull. N. P. 47; 1 Crompt. Prac. 184. Per Lord HARDWICKE, in *Smith v. Gibson*, Rep. Temp. Hard. 319. "It is a sale of the thing to the defendant, which vests the property in him." 3 Starkie's Ev. part 4, page 1281. So judgment for the plaintiff in *replevin* in the *detinet* for damages, vests the property of the goods in the

defendant. *Moor v. Watts*, 1 Ld. Raym. 614; 12 Mod. 428. In New York, however, it is held, that the property of the plaintiff in the goods in such cases, is not changed, until the defendant shall have paid, or satisfied the judgment, in conformity to the rule *solutio pretii, emptiois loco habetur*, which seems to be sanctioned by what is laid down in Jenk. cent 4, case 88, page 189. *Curtis v. Groat*, 6 Johnson, 168; *Osterhout v. Roberts*, 8 Cowen, 43. But in Virginia, in *Murrell v. Johnson's Adm.*, 1 Henning and Mun. 449, the court seemed to think, that A, whose slave had been sold without his authority, by B to C, and by C delivered to D, having brought an action of *detinue*, and obtained a judgment in it against C, could not afterwards maintain an action of *detinue* against D for the same slave, notwithstanding his judgment against C still remained unsatisfied. So if the plaintiff brings an action of *assumpsit*, instead of trover or trespass against the defendant, who has sold his goods without authority, as he may do according to many of the foregoing cases, and recovers a judgment, I apprehend that he cannot afterwards sustain an action of any kind against the vendee of the defendant, or any person claiming the goods under him. And this not merely for the reason assigned in the cases cited above, but for an additional, and perhaps still more forcible one, which is, that by thus claiming the money arising from the sale made of the goods by the defendant, he thereby affirms it, for the money arising from the sale of the goods is all that the plaintiff can claim and recover in the action of *assumpsit*, and by taking a judgment for it. it does appear to me, that he thereby ratifies and confirms the sale made of the goods, and he shall not afterwards be permitted to gainsay it. *Omnis ratihabitio retrotrahitur et mandato seu licentiæ æquiparatur*. *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Bennitt v. Francis*, 4 Esp. Rep. 28. Accordingly, in *Brewer v. Sparrow*, 7 B. & C. 310; S. C. M. & R. 2, it was held, that a person having once affirmed the acts of another, who wrongfully sold his property, cannot afterwards treat him as a wrongdoer, and maintain trover against him. And should the plaintiff fail, on trial of the action of *assumpsit*, and have a verdict and judgment given against him, still he would be precluded thereby from maintaining another action for the same goods, involving the same evidence, and in effect, the same cause of action. for the question, or subject-matter of dispute, having passed once in *rem judicatam*, he shall not again vex the defendant or those claiming under him with a second action. *Young v. Black*, 7 Cran. 567.

Neither is it material in such cases, that both actions were commenced on the same day, or at different dates, and were both pending afterwards, at the same time, and the action last brought, tried first, and judgment rendered in it; still the plaintiff will be bound by it, and be precluded from further maintaining the action first entered,

and so *vice versa*. This was the case in *Garvin v. Dawson*, 13 Serg. & Rawle, 246, where the second action between the parties commenced about one month after the first was tried, and a judgment rendered in it in favour of the defendant, which was afterwards held to be a bar to the plaintiff's further maintenance of his first action. This is according to the rule, *nemo bis vexari debet*, which allows to every one the opportunity of having his complaint fairly investigated, and fully heard before the judicial tribunals of the state, but being once decided by the proper court, after such investigation and hearing, the peace and quiet of the community require that there should be an end of the dispute. If we disregard this rule we have no other, and every controversy must become interminable.

From the views which I have taken of this part of the case, it appears to me, that the exemplification of the record of the Superior Court of the city of New York, was not only pertinent to the issue joined, and therefore admissible, but would have been conclusive evidence against the plaintiff's right of property to the logwood, had it been received, unless he had shown that the logwood for which he made a claim in that action, was not the same claimed in this, or that he had on the trial of that, withdrawn that part of his claim which consisted of the logwood. The defendant below in this action, pleaded property in the logwood, and the judgment of the Superior Court of the city of New York, showing that the plaintiff had been divested of his right to it, by a sale made thereof, under which the defendant below in this action, claims to derive his right, established greatly the most important link in the chain of his title. And although the judgment of the Superior Court of the city of New York was rendered during the pendency of this action, still I think it was not necessary to plead it, in order to make it admissible evidence, because it was, in effect, the decision of a competent court of concurrent jurisdiction, given in affirmance of the sale of the logwood, mentioned in the record of the judgment made by the defendants therein named, before the commencement of this action, under which the defendant here claims a right to the logwood. Neither do I conceive that it was necessary to plead it, in order to make it conclusively binding upon the jury against the plaintiff below; for if it was properly admissible under the plea of property, of which I entertain no doubt, as it went directly to establish the validity of the sale of the logwood, under which the defendant below claimed it, it being the judgment of a competent court, must be considered the conclusion or sentence of the law on the facts of the case, and therefore not to be set aside, reversed or disregarded, by either court or jury in this action. This doctrine, as I conceive, is not inconsistent with the rule laid down by a majority of this court, in *Kilheffer v. Herr*, 17 Serg. & Rawle, 322, but comes within the qualification there mentioned, but wherever the party is not bound to plead specially to enable him to give the

record of a former recovery in evidence, it will, when given, in evidence, although not pleaded, be conclusive and binding upon the plaintiff, the court, and the jury. 1 Phil. Ev. 223, 224 (New York, 1816). Where a subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The peace of the community is a great *desideratum*, and nothing ought to be tolerated, that would disturb it unnecessarily. Before the rendition of a judgment, the court is presumed to be made acquainted by one or the other, or by both of the parties, with everything that is necessary to be known, in order to procure a correct decision upon the case; so that the judgment of the court not being pronounced until after it has been so informed, must be taken and considered as corresponding and answering fully to the claims of justice. It is therefore altogether inadmissible to say, that a renewal of the contest shall or ought to be permitted, because the first decision was not just or right.

The propriety of those decisions which have admitted a judgment in a former suit, to be given in evidence to the jury on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment because it was not pleaded, may well be questioned. The maxim, *nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the protection and benefit of the party, that he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits of a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *expedit reipublicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet, to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of

suitors, to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the state, would be bound to give their time and attention to the trial of new actions, for the same causes, tried once or oftener, in former actions between the same parties or privies, without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes, which never have passed *in rem judicatam*. The effect of a judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed.

Judgment reversed, and a *venire facias de novo* awarded.¹

¹A considerable diversity exists as to when an election to sue in tort or contract is made. If the judgment obtained in one form of action has been satisfied, it is clear the election has been made, and a subsequent recovery in the other form of action should not be permitted. *Hawkins v. Hatton* (1818) 1 Nott & Mc. 318; *Hepburn v. Sewell* (1821) 5 Harris & J. 211; *Thomas v. Rumsey* (1810) 6 Johns. 26; *Stone v. Dickinson* (1862) 5 Allen, 29; *Ware v. Percival* (1872) 61 Me. 391; *Walker v. Fuller* (1874) 29 Ark. 448, S. C. 10 Am. St. Rep. 479 (with note on election). See also *Cooper v. Shepherd* (1846) 3 M. G. & S. 266.

As to a mere judgment, unsatisfied, being a binding election, *SHAW, C. J.*, in *Norton v. Doherty* (1855) 3 Gray, 372, says: "When a plaintiff elects one [remedy] and pursues it to judgment, such judgment is a bar to another action. . . . In all cases where the plaintiff has his option, in the outset, to bring tort or contract, to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect, is, upon principle, a bar to the other." *Goodrich v. Yale* (1867) 97 Mass. 15; *Prince v. City of Quincy* (1889) 128 Ill. 443; *Brown v. Bowen* (1856) 42 Me. 44; *Duncan v. Stokes* (1873) 47 Ga. 593; *Smith v. Way* (1864) 9 Allen, 472; *Walsh v. Canal Co.* (1882) 59 Md. 423; *Black, Judgments*, § 729 and cases cited; though it has been held that a judgment on demurrer is not a bar. *Wilbur v. Gilmore* (1838) *ante*; *White v. Waste Corp.* (1901) 178 Mass. 20; and it would seem immaterial whether the first action is tort or assumpsit. *Rice v. King* (1810) 7 Johns. 20; *Kitchen v. Campbell* (1772) 3 Wils. 304, S. C. 2 W. Black. 827.

{A closely allied question arises here as to whether or not a judgment, in tort, passes title. It is generally understood that in England title does pass

HUFFMAN v. HUGHLETT & PYATT.

SUPREME COURT OF TENNESSEE, 1883.

[11 *Lea*, 549.]

Appeal in error from the Circuit Court of Scott County.

COOPER, J., delivered the opinion of the court.¹

On March 12, 1881, Hughlett & Pyatt sued out an original attachment against the estate of H. P. Springer, a non-resident of the State, the affidavit for the writ stating that Springer was indebted to them in the sum of seventy dollars "due by account for black walnut lumber that the said H. P. Springer wrongfully took from them, and converted to his own use." The attachment was issued and levied, and publication made requiring the said Springer to appear on April

by the judgment, and the following authorities are usually cited to establish the view. *Bishop v. Montague* (1600) Cro. Eliz. 824; *Brown v. Wootton* (1605-6) Yelv. 66, S. C. Cro. Jac. 73, Moore, 762; *Adams v. Broughton* (1737) 2 Stra. 1078, S. C. Andrews, 18; *King v. Hoare* (1844) 13 M. & W. 494; *Buckland v. Johnson* (1854) 15 C. B. 145; *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547; [but see *Morton's Case* (1584) Cro. Eliz. 30; *Ferrer v. Arden* (1599) Cro. Eliz. 668; *Sir John Heydon's Case* (1612-13) 11 Co. 5a; *Brooke, Judgments*, p. 98; *Coke v. Jenner* (1703) Hob. 619; *Corbet v. Barnes* (1636) Wm. Jones, 377; *Shower, arguendo*, in *Claxton v. Swift* (1684) 2 Show. 441, S. C. (1685) *id.* 494; Lord ELLENBOROUGH's opinion in *Drake v. Mitchell* (1803) 3 East, 251, 258. And see also the opinions of KENT, C. J., in *Livingston v. Bishop* (1806) 1 Johns. 290, and HOSMER, C. J., in *Sheldon v. Kibbe* (1819) 3 Conn. 214].

In America, satisfaction of the judgment is usually considered necessary to pass title. *Lovejoy v. Murray* (1865) 3 Wall. 1; *Livingston v. Bishop* (1806) 1 Johns. 290; *Miller v. Hyde* (1894) 161 Mass. 472; *Atwater v. Tupper* (1877) 45 Conn. 144; *Sheldon v. Kibbe* (1819) 3 Conn. 214; *Sanderson v. Caldwell* (1826) 2 Aiken, 195; *Elliott v. Porter* (1837) 5 Dana, 299,—(in all of which cases the subject is carefully considered); and see also *Turner v. Brock* (1871) 6 Heisk. 50; *Osterhout v. Roberts* (1827) 8 Cowen, 43 (and note-case in Waterman's edition); 2 Kent's Com. 388 and note; 1 Greenleaf, Evidence, § 533; but see, contra, *Floyd v. Browne* (1829) 1 Rawle, 121 (cf., the court apparently attempting to limit the doctrine of this case, *Fox v. Northern Liberties* (1841) 3 W. & S. 103, but later reverting to the first doctrine, *Merriek's Estate* (1842) 5 W. & S. 1, 17); *Rogers v. Moore* (1838) 1 Rice, 60 (allowing creditor of defendant to proceed against the property after judgment, and before satisfaction); *Norris v. Beckley* (1818) 2 Mill's Const. 228; *Bogan v. Wilburn* (1842) 1 Spears, 179; and see *Freeman, Judgments*, § 237. Other courts have held that though the judgment does not vest title, suing out execution will, *Curtis v. Groat* (1810) 6 Johns. 168, 169, even though there be no satisfaction. *White v. Philbrick* (1827) 5 Greenl. 147; *Fleming v. McDonald* (1875) 50 Ind. 278. For a critical survey of the question and the principles involved, see "The Disseisin of Chattels," by James

¹Only a part of the opinion is given.—ED.

21, 1881, before the justice who issued the writ, for a hearing. On April 21, 1881, Hughlett & Pyatt, upon an affidavit that Springer was either the partner or agent of M. J. Huffman, sued out a summons against H. P. Springer and M. J. Huffman to answer them in an action of debt in a sum under \$100. This summons was issued by the same justice of the peace, executed upon Huffman, and made returnable before the justice on the same day. The plaintiffs appealed from the judgment rendered by the justice. In the circuit court, the case was tried by the judge without a jury, who rendered a judgment in favor of the plaintiffs against both of the defendants for the value of the lumber sued for. Huffman alone appealed.

The bill of exceptions shows that after the papers in the case were read, the plaintiffs and the defendant Huffman introduced oral proof showing the following facts, viz.: "Plaintiffs were, as partners, the

Barr Ames, 3 Harv. Law Rev. 23, 313, 317 (particularly at p. 326 *et seq.*); "Transfer of Personal Property by Judgment," 3 Am. L. Mag. 49; an article by Mr. Maitland on an allied topic, "Seisin of Chattels," 1 Law Quarterly Rev. 324; and the well-considered opinions in *Miller v. Hyde* (1894) 161 Mass. 492.}

But the authorities are even less uniform as to what will constitute an election before judgment. "If he [one whose goods have been taken] bring an action for money had and received, this is a conclusive waiver of the tort, and if he bring trover, that is an election to treat the matter as a tort." *Smith v. Baker* (1873) L. R. 8 C. P. 350, S. C. 42 L. J. P. 155, citing *Buckland v. Johnson* (1854) 15 C. B. 145, S. C. 23 L. J. N. S. C. P. 204; and in *Smith v. Hodson* (1791) 4 T. R. 211, S. C. *Smith's Leading Cas.* (9th ed. Am. Notes) 1372, and notes, Lord KENYON held that a plaintiff, by bringing an action in assumpsit for goods fraudulently assigned by a bankrupt to the defendant, had affirmed the transaction as a sale. To the same effect *SHAW. C. J.*, in *Butler v. Hildreth* (1842) 5 Met. 49. The question really involves several points:

First, the power of amending pleadings, either as a matter of course, or by the discretion of the court. Some courts refuse any amendment that will change the cause of action from one *ex contractu* to one *ex delicto*, and *vice versa*, *Supervisors v. Decker* (1874) 34 Wis. 378; *Stevenson v. Mudgett* (1839) 10 N. H. 338, S. C. 34 Am. Dec. 155, and note; *People v. Circuit Judge* (1865) 13 Mich. 206; but generally the rule is not so strict. Changes have been permitted after trial begun and the preliminary evidence given. *Culp v. Steere* (1892) 47 Kan. 746, on the theory that the restrictions as to amendment do not refer to the form, but to the general identity of the transaction forming the cause of complaint. *Spice v. Steinruck* (1863) 14 Ohio St. 213; and New York permits any amendment which does not necessitate the issuance of a new summons. *Brown v. Leigh* (1872) 12 Abb. Prac. N. S. 193; *Hopf v. U. S. Baking Co.* (1892) 21 N. Y. Supp. 589 (where, after verdict for the plaintiff was set aside, he was permitted to amend a complaint which alleged a wrongful harboring of his son, so as to seek recovery for the services); and see on the general topic, *Pomeroy, Remedies*, § 566, and cases cited; *Bliss, Code Pleading*, § 429, and authorities.

owners of three walnut logs in New River containing 2,000 feet, and worth seventy dollars. These logs floated down the river to Russell's mill, and were then taken and converted by the defendant Springer, and sawed into lumber, and afterwards sold by him to the defendant without authority from plaintiffs, and the facts were so found by the court. The court adjudges that these facts constituted a trover and conversion of said property by each of said defendants, and that both of them were liable to plaintiffs for the value thereof by reason of said facts; and that plaintiffs, having waived the tort, and sued defendants for the value of said lumber, were entitled to the same."

The suit was commenced by foreign attachment against Springer alone for the value of the lumber in controversy, based upon the implied assumpsit arising from the wrongful conversion of the property by the defendant. The suit was converted into a joint action against Springer and Huffman by a summons based upon the same

Second'y, the power of a plaintiff voluntarily to discontinue one cause of action and begin another of a different kind. This has been permitted. *Cooper v. Smith* (1896) 109 Mich. 458; *Equitable Foundry Co. v. Hersee* (1884) 33 Hun, 169; *Peters v. Ballister* (1826) 3 Pick. 495 [where the suit was discontinued before trial, *Smith v. Hodson*, *supra*, being before the court. SHAW, C. J., later restricted the decision to cases where the first action was entirely misconceived. This view was affirmed in *White v. New Bedford, etc., Corp.* (1901) 178 Mass. 20]. The principle has been applied where an unauthorized suit in assumpsit has been brought by an agent, on a sale induced by fraud. The principals, on learning of it, were permitted to discontinue the assumpsit and bring replevin. *Lee v. Burnham* (1892) 82 Wis. 209.

Thirdly, for a binding election, the two remedies must be coexistent. While a man having an election must elect or affirm the whole transaction, not merely that which is for his benefit, *Smith v. Hodson*, *supra*, 2 Smith Lead. Cas. (9th Am. ed.) 1372 and note, yet where the defendant received goods tortiously, and sold part, the fact that for the part sold, the plaintiff had recovered in an action for money had and received, was no bar to a subsequent action in replevin for the part unsold. *Browning v. Bancroft* (1844) 8 Met. 278; and see *Singer v. Schilling* (1889) 74 Wis. 369; *Kynaston v. Crouch* (1845) 14 M. & W. 266; *Freeman, Judgments*, § 238.

Fourthly, the binding effect of any act of the plaintiff before suit brought. 'If the party electing has done—whether he intended it or not—an unequivocal act, i. e., an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election,' per Lord BLACKBURN, *Scarf v. Jardine* (1882) 7 Ap. Cas. 345, 361. The receipt of proceeds of goods tortiously taken is such an act of election and bars an action in tort, *Brewer v. Sparrow* (1827) 7 B. & C. 310, though a mere demand for them is not, *Valpy v. Sanders* (1848) 5 C. B. 886; and even a receipt of part of them is not in all cases an election, *Burn v. Morris* (1834) 2 Cr. & M. 579; but see *Lythgoe v. Vernon* (1860) 5 H. & N. 180. For this whole doctrine consult 16 Law Quarterly Rev. 160.—Ed.

implied promise. The affidavit upon which the plaintiff was permitted to make Huffman a party assumes the ground that Springer was his agent or partner. This affidavit, although in the record, is no part of it, not being incorporated in any bill of exceptions. The trial judge finds that in an action against the defendants, based on the facts of the case, as all of our civil actions are now under the Code, for the value of property wrongfully converted, Springer took and converted the logs of plaintiffs, sawed them into lumber, and sold the lumber to Huffman without authority of the plaintiffs, and that both defendants are liable to the plaintiffs for the value of the property. It is now insisted for the defendant Huffman, that the suing out of the original attachment against Springer was a waiver of the tort in the original taking, the result of which was to turn Springer into a purchaser of the chattels, and to validate the sale by him to Huffman.

The argument in support of the position thus taken is rested partly on the decisions of this court, which give to the action on the implied promise arising from a conversion of personalty all the incidents of any other action *ex contractu*, and partly on the holdings of the court, as to the effect of the waiver of a tort on the rights of action of the injured party. But the fact that a suit in a particular form of action must have all the incidents attached by law to that form of action, can have no necessary bearing on the effect of the form of action on the rights or remedies of the plaintiffs. And the holdings of the court on the effect of the waiver of a tort, which have been cited, only go to this extent that if the aggrieved party after a technical conversion resume possession of the property as owner, or otherwise assents to the tortious taking, the remedy in trover is gone. *Trayner v. Johnson*, 1 Head, 51; *Bell v. Cummings*, 3 Sneed, 275; 2 Greenl. Ev., sec. 642, note 3. He may still sue in case for the tort which he might have treated as a conversion, or in assumpsit upon the implied promise. *Scruggs v. Davis*, 5 Sneed, 262; *Railroad v. Henderson*, 1 Lea, 1. If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as NICHOLSON, C. J., has more accurately expressed it, a waiver of the "damages for the conversion," and a suing for the value of the property. *Kirkman v. Philips*, 7 Heis. 222, 224. It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoers unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tortfeasors, even the last, on the implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one.

The trial judge finds that Springer was guilty of a conversion of the property. Of course, he could communicate no title to a third person, even if he were a *bona fide* purchaser for value and without notice.

Even in such a case the right to recover the property, if in existence, or its value if disposed of by the purchaser, would be clear. *Price v. Jones*, 3 Head. 85. Whether a demand and refusal are necessary to establish a conversion in such cases is left in some obscurity by the authorities. They are only evidence of a conversion, and are unnecessary where there is other evidence of the conversion. *Houston v. Dyche*, Meigs, 76. The tendency of our decisions is to limit the requirement to cases where the possession was rightfully acquired, and dispense with it where the act of taking possession was itself a conversion. *Merchants' National Bank v. Trenholm*, 12 Heis. 520. The trial judge in this case does not find that Huffman was a *bona fide* purchaser without notice. He finds that the property was sold to him by the first wrongdoer without authority from the plaintiffs. The dominion or control thus acquired would necessarily be in his own right, and adverse to the right of the true owner. And the facts would warrant the conclusion reached by the trial court. The findings are not in the nature of a special verdict to which the court is to apply the law, but facts from which the judge, acting as a jury, might draw the necessary conclusions for a general verdict.

Affirm the judgment.¹

¹In determining the liability of a second tortfeasor, after action brought or judgment obtained against a first, two points must be kept in mind: First, the nature of the liability of co-tortfeasors, whether joint, or joint and several; and, secondly, the question as to when there has been an election of remedies (for which see note to *Marsh v. Pier*, *supra*).

In England the liability is considered joint only. *Lendall v. Pinfold* (1854) 1 Leon. 19 [*quære*]; *Brown v. Wooton* (1605-6) Yelv. 66, S. C. Cro. Jac. 73, Moore, 762; *Warden v. Bailey* (1811) 4 Taunt. 67, 88; *King v. Hoare* (1844) 13 M. & W. 494; *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547; 1 Chitty, Pleading, 100; Buller, N. P. 20; Comyn's Dig., title Action, K (4); [but Williams in a note to 1 Saunders, 207a, says: "It seems clear, that where any action founded upon a *tort*, such as assault and battery, false imprisonment, trover and the like, is brought against several defendants, though they all join in the same plea, and be found jointly guilty, yet the plaintiff may after verdict enter a *nolle prosequi* as to some of them, and take his judgment against the rest. 1 Ld. Raym. 397, *Coux v. Lowther*; 1 Wils. 306, *Dale v. Eyre*; and the reason thereof seems to be, because these actions [are] joint and several." And see *Morton's Case* (1584) Cro. Eliz. 30; Anonymous (1585) 3 Leon. 122; per Showers, *arguendo*, in *Claxton v. Swift* (1684) 2 Show. 494; Lord MANSFIELD, in *Bird v. Randall* (1762) 3 Burr. 1346, 1353; *Mitchell v. Tarbutt* (1794) 5 T. R. 649; *Martin v. Kennedy* (1800) 2 B. & P. 69; *Sutton v. Clarke* (1815) 6 Taunt. 29; *Day v. Porter* (1838) 2 Moo. & R. 151; opinions of KENT, C. J., in *Livingston v. Bishop* (1806) 1 Johns. 290, and of HOSMER, C. J., in *Sheldon v. Kibbe* (1819) 3 Conn. 214, where the early English authorities are discussed; Freeman, Judgments, § 236]; and so, under a declared analogy to join obligors, *King v. Hoare*, *supra*, it was properly held that an unsatisfied judgment in tort against one tortfeasor, was a bar to an action, sounding in assumpsit against the other. *Buckland v. Johnson*

SECTION II.

MONEY PAID BY PLAINTIFF UNDER COMPELSION.

1. UNDER DURESS, LEGAL OR EQUITABLE.

TOMKINS v. BERNET.

NISI PRIUS, 1693.

[*Salkeld*, 22.¹]

THREE were bound in an usurious obligation; one of them paid some part of the money, and afterwards the obligee brought debt against another of the obligors, who pleaded the statute of usury, and avoided the bond; and now the obligor that had paid some part of the

(1854) 15 C. B. 145, though PARKE, B., in *King v. Hoare*, suggests that the first judgment would not be a bar if the liability were joint and several.

In America, generally, "the liability for torts committed by more than one person is always several as well as joint," *Creed v. Hartmann* (1864) 29 N. Y. 591, 597; "for all or any may be sued at the election of the plaintiff." *Blann v. Crocheron* (1851) 19 Ala. 647, S. C. 54 Am. Dec. 203, and notes; *Chamberlin v. Murphy* (1868) 41 Vt. 110, 118; *Livingston v. Bishop* (1806) 1 Johns. 290; *Sheldon v. Kibbe* (1819) 3 Conn. 214; *Atwater v. Tupper* (1877) 45 Conn. 144; *Sanderson v. Caldwell* (1826) 2 Aiken, 195; *Rose v. Oliver* (1807) 2 Johns. 365; *Smith v. Rines* (1836) 2 Sumn. 338; *Ayer v. Ashmead* (1863) 31 Conn. 447, 453; *Brady v. Ball* (1860) 14 Ind. 317; *Whitaker v. English* (1784) 1 Bay, 15; *Jones v. Lowell* (1853) 35 Me. 538. But see, *Wilkes v. Jackson* (1808) 2 Hen. & Munf. 355; *Floyd v. Browne* (1829) 1 Rawle 121; *Rogers v. Moore* (1838) 1 Rice, 60; *Hunt v. Bates* (1862) 7 R. I. 217; see also, *Freeman, Judgments*, § 236. Accordingly, a plea in abatement for non-joinder of co-tort-feasors does not lie. *Bloss v. Plymale* (1869) 3 W. Va. 393 [see *Mitchell v. Tarbutt* (1794) 5 T. R. 649]; nor will judgment be arrested because all were not joined, *Rose v. Oliver*, *supra*, though joint tenants of real property involved must be joined. *Low v. Mumford* (1817) 14 Johns. 426. Therefore, if the concurrent remedies are consistent and compatible, *Rawson v. Turner* (1809) 4 Johns. 469; note to *Smith v. Hodson*, 3 Smith's Lead. Cas. (6th ed.) 198, unless there has been full satisfaction, *Hawkins v. Hatton* (1818) 1 Nott & Mc. 318; *McGehee v. Shafer* (1855) 15 Tex. 198; *Hepburn v. Sewell* (1821) 5 Harris & J. 211; *Thomas v. Rumsey* (1810) 6 Johns. 26; *Stone v. Dickinson* (1862) 5 Allen, 29; *Livingston v.*

¹This case is likewise reported in 1 Skinner, 411, as tried before HOLT, C. J., in which that learned judge reiterated his deep-rooted opposition to the extension of the action of assumpsit: "And if they will make such [usurious] contracts, they ought to be punished; and he was not for encouraging such kinds of *indebitatus assumpsits*."—ED.

money without cause to the obligee, brought an *indebitatus assumpsit* against him to recover back that money. TREBY, C. J., allowed that where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence, and the party that pays it is *particeps criminis*; and there is no reason that he should have his money again, for he parted with it freely, and *volenti non fit injuria*. This case was cited: One bound in a policy of assurance, believing the ship to be lost when it was not, paid his money, and it was held he might bring an *assumpsit* for the money. One was employed as a solicitor, and had money given him to bribe the custom-house officers; and he laid out the money accord-

Bishop, *supra*, a judgment against one tortfeasor is generally no bar to an action against another, the actions being the same. *White v. Waste Corp.* (1901) 178 Mass. 20 (*assumpsit*); *Rawson v. Turner, supra* (debt, the latter action against a sheriff for an escape, judgment and execution having issued against his predecessor). *Sharp v. Gray* (1844) 5 B. Mon. 4 (*detinue*); *Osterhout v. Roberts* (1827) 8 Cowen, 43; *Atwater v. Tupper, supra* (*trover*); *Wright v. Lathrop* (1825) 2 Ohio, 33 (elaborately argued); *Knott v. Cunningham* (1854) 2 Sneed, 204; *Griffie v. McClung* (1872) 5 W. Va. 131; *Collard v. Railroad Co.* (1881) 6 Fed. 246 (*trespass*); *Sheldon v. Kibbe, supra*; *Wilkes v. Jackson, supra* (*assault and battery*). Where the two actions have been different, the rulings have been various.¹ *Sanderson v. Caldwell* (1826) 2 Aiken, 195 (recovery allowed, *trespass* and *trover*), contra, *Johnson v. Packer* (1817) 1 Nott & Mc. 1; *Hunt v. Bates* (1862) 7 R. I. 217 (recovery denied, *trover* and *trespass*); *Elliot v. Porter* (1837) 5 Dana, 299 (recovery permitted, *detinue* and *trover*); *Du Bose v. Marx* (1875) 52 Ala. 506 (recovery permitted, *detinue* and *trespass*); *Floyd v. Browne* (1829) 1 Rawle, 121 (recovery refused, tort and *assumpsit*, but in Pennsylvania a judgment passes title, *supra*); *Hyde v. Noble* (1843) 13 N. H. 494 (first *assumpsit* for breach of contract), *Du Bose v. Marx, supra*, *Ins. Co. v. Cochran* (1855) 27 Ala. 228 (on the theory of ratification), *Terry v. Munger* (1890) 121 N. Y. 161 (in all, recovery refused, *assumpsit* and tort). It has been held that partial satisfaction for a tort does not bar a recovery for the balance. *Chamberlin v. Murphy* (1868) 41 Vt. 110; *Lovejoy v. Murray* (1865) 3 Wall. 1 (see latter for discussion of the general principle); *Marlborough v. Sisson* (1863) 31 Conn. 332. But a partial satisfaction on a judgment conclusively determines, as to both parties, the measure of damages. *United Society of Shakers v. Underwood* (1875) 74 Ky. 265. Execution, without satisfaction has been held to bar a second suit, *White v. Philbrick* (1827) 5 Greenl. 147; *Campbell v. Phelps* (1822) 1 Pick. 62; but execution against the person has been deemed insufficient. *Osterhout v. Roberts, supra*; *Sheldon v. Kibbe, supra*. And a discharge of one has been held a discharge of all, unless the contrary clearly appears. *Eastman v. Grant* (1861) 34 Vt. 387; *Ayer v. Ashmead* (1863) 31 Conn. 447; *Allen v. Wheatly* (1834) 3 Blackf. 332; *Irwin v. Scribner* (1860) 15 La. Ann. 583; *Baker v. Lovett* (1809) 6 Mass. 78.—Ed.

ingly. Assumpsit was brought against the solicitor for this money, and held it lay not.¹

BOSANQUETT v. DASHWOOD.

HIGH COURT OF CHANCERY, 1735.

[*Cases Tempore Talbot*, 37.]

THE plaintiffs being assignees under a commission of bankruptcy against the two Cottons, brought their bill against Dashwood the defendant, as executor of Sir Francis Dashwood, who had in his lifetime lent several sums to the Cottons, the bankrupts, upon bonds bearing £6 per cent. interest, being the then legal interest, and had taken advantage of their necessitous circumstances, and compelled them to pay at the rate of £10 per cent., to which they submitted, and entered into other agreements for that purpose; and so continued paying £10 per cent. from the year 1710 to the year 1724.

It was decreed at the Rolls that the defendant should account; and that for what had been really lent, legal interest should be computed and allowed; and what had been paid over and above legal interest should be deducted out of the principal at the time paid; and the plaintiffs to pay what should be due on the account: and if the testator had received more than was due with legal interest, that was to be refunded by the defendant, and the bonds to be delivered up.

LORD CHANCELLOR [TALBOT]. There is no doubt of the bonds and contracts therein being good: but it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters which have been read, and which prove an agreement to pay £10 per cent., and that from Sir Francis Dashwood's receipts; but whether the plaintiffs be entitled to any relief in equity, the money being paid, and those payments agreed to be continued, by several letters from the Cottons to Sir Francis Dashwood, wherein are promises to pay off the residue, is now the question.

The only case that has been cited that seems to come up to this, is that of *Tomkins v. Bernet*, 1 Salk. 22, which proves only, that where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And though a court of equity will

¹When the principal case was cited in argument in *Clark v. Shea* (1774) Cowp. 197, Lord MANSFIELD interposed "That case has been denied a thousand times," and in his delivering judgment the same learned judge said: "The case of *Tomkins v. Bernet* has been long exploded. In *Bosanquett v. Dashwood*, Lord HARDWICKE and Lord TALBOT both declared their disapprobation of it; for in that case there was not *par delictum*."

See further criticism of the case in *Smith v. Bromley*, *post*.—Ed.

not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them.

The penalties, for instance, given by this act, are not to be sued for here; nor could this court decree them. And though no *indebitatus assumpsit* will lie, in strictness of law, for recovering of money paid upon an usurious contract; yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The case of Sir Thomas Meers, heard by the Lord HARCOURT, is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this: Sir Thomas Meers had in some mortgages inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest: upon a bill filed, the LORD CHANCELLOR relieved the mortgagors against this covenant as unjust and oppressive. So likewise, is the case of Broadway, which was first heard at the Rolls, and then affirmed by the Lord KING, an express authority that in matters within the jurisdiction of this court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is, because all those cases carry somewhat of fraud with them. I do not mean such a fraud as is properly deceit; but such proceedings as lay a particular burden or hardship upon any man: it being the business of this court to relieve against all offences against the law of nature and reason: and if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law (as in this case) against the statute of usury, though the party may have submitted for a time to the terms imposed on him?—The payment of the money will not alter the case in a court of equity; for it ought not to have been paid: and the maxims of *volenti non fit injuria* will hold as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered: it is that only which the statute has in view: and it is that only which entitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel, of the bankrupts being *particeps criminis*; for they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship which he labors under, and which is imposed on him by another, that makes the crime.¹ The

¹“The rule is, *in pari delicto, patior est conditio defendentis*: and there are several other maxims of the same kind. . . . But, where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men; the one, from their situation and condition,

case of gamesters, to which this has been compared, is no way parallel; for there, both parties are criminal: and if two persons will sit down and endeavor to ruin one another, and one pays the money, if after payment he cannot recover it at law, I do not see that a court of equity has anything to do but to stand neuter; there being in that case no oppression upon one party, as there is in this. Another difficulty was made as to the refunding: but is not that a common direction in all cases where securities are sought to be redeemed, that if the party has been overpaid, he shall refund? Must he keep money that he has no right to, merely because he got it into his hands?—I do not determine how it would be, if all the securities were delivered up; this is not now before me: I only determine what is now before the court; and is the common direction in all cases where securities are sought to be redeemed.¹

And so affirmed the decree, &c.

being liable to be oppressed or imposed upon by the other; *there*, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. For instance, by the statute of usury, taking more than 5 per cent. is declared illegal, and the contract void; but these statutes were made to protect needy and necessitous persons from the oppression of *usurers* and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore, the party injured may bring an action for the excess of interest." Per Lord MANSFIELD, in *Browning v. Morris* (1778) Cowp. 790, 792, post 669.—Ed.

¹Accord: *Fanning v. Dunham* (1821) 5 Johns. Ch. 122. In the absence of a statute to the contrary "this represents the general view." *Heacock v. Swartwout*, 28 Ill. 291 [1862]; *Sutphen v. Cushman*, 35 Ill. 186 [1864]. For the rule applied in cases where the mortgagor is defendant, see *Kuhner v. Butler*, 11 Ia. 419 [1861]; *Union Bank v. Bell*, 14 Oh. St. 200 [1863]; *Snyder v. Griswold*, 37 Ill. 216 [1865]. Compare *Hunt v. Acre*, 28 Ala. (N. S.) 580 [1856]." Note to *Kirchwey's Cases on Mortgages*, 233.

For the effect of a statute upon the right of recovery and the relief granted, see *Williams v. Fitzhugh* (1868) 37 N. Y. 444; *Marvin v. Mandell* (1878) 125 Mass. 562; *Gist v. Smith* (1880) 78 Ky. 367. As to whether a transaction tainted with usury may be split up, so as to permit recovery, see *Shaw v. Carpenter* (1881) 54 Vt. 155.

In discussing the effect of the statute of limitations upon usurious payments the court said in *Albany v. Abbott* (1881) 61 N. H. 157, 159: "Every time the plaintiffs paid the defendant usury, a cause of action accrued (*Breckenridge v. Churchill*, 3 J. J. Marsh. 15), against which the statute immediately commenced to run (*Rushing v. Rhodes*, 6 Ga. 228, *Davis v. Converse*, 35 Vt. 503), and consequently the plaintiffs can only recover the illegal interest actually paid as such within six years next before the commencement of this suit."—Ed.

SMITH v. BROMLEY.

KING'S BENCH, 1760.

[2 *Douglas*, 696.]

ACTION for money had and received to the plaintiff's use; upon this case: The plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commission against him, but, afterwards, finding no dividend likely to be made, refused to sign his certificate. But on frequent application and earnest entreaties, made by the bankrupt to one Oliver, a tradesman in town, who was an intimate friend of the defendant, who lived in Cheshire, he got Oliver to write to the defendant several times, and he at last prevailed on the defendant to send him, Oliver, a letter of attorney, empowering him to sign the certificate, which Oliver would not do, unless the bankrupt, or somebody for him, would advance £40 and give a note for £20 more, and which, on Oliver's signing the certificate for the defendant, the plaintiff (who was the bankrupt's sister), paid, and gave to Oliver accordingly, who thereupon gave her a receipt for the money, promising to return it if the certificate was not allowed by the CHANCELLOR. The certificate was allowed. The plaintiff afterwards brought her action against Oliver to recover back the £40 from him, but, that action coming on to be tried before Lord MANSFIELD, at Guildhall, at the sittings after last Trinity term, and it then appearing that Oliver had actually paid over, or accounted for, the £40 to Bromley, and his lordship being clearly of opinion that this action would not lie against the plaintiff's own agent, who had actually applied the money to the purpose for which it was paid to him, the plaintiff was nonsuited in that action; and now she brought this action against Bromley himself; which coming on to be tried, it was proved that the money was received by Oliver, and paid over to the defendant.

It was contended for the plaintiff, that this money was paid either without consideration, or upon one that was illegal, and, in either case, was recoverable back by this action.

For the defendant, it was argued, that there was certainly a consideration for the payment of the money, to wit, the signing of the bankrupt's certificate; That, if this consideration was illegal, the plaintiff was *particeps criminis*, had paid it voluntarily and knowingly, and without any deceit, and so was within the case of *Tomkins v. Bernet*, H. 5 Will. 3, at N. Pr., before TREBY, Chief Justice, 1 Salk. 22; but that there was nothing illegal in it; for it was the money of a third person, and so no diminution of the bankrupt's effects, or fraud upon his creditors; in which case only, whereby the distribution becomes unequal, is there any iniquity in receiving a consideration for signing the certificate.

But Lord MANSFIELD was of a different opinion. He said, it was iniquitous and illegal in the defendant to take, and, therefore, it was so to detain this £40. If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive, and, whether it was the bankrupt or his sister that paid the money, it is the same thing. The taking money for signing certificates is either an oppression on the bankrupt or his family or a fraud on his other creditors. It was a thing wrong in itself, before any provision was made against it by statute; for if the bankrupt has conformed to all the law requires of him, and has fairly given up his all, the creditor ought in justice to sign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud or concealment, the creditor ought not to sign for any consideration whatever. If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family; if it is the money of the bankrupt himself, it is giving one creditor his debt to the exclusion of the others, and a fraud upon them. As to the case cited from Peere Williams, that only affected the person who petitioned. There might have been sufficient of the creditors in number and value to sign without him, and he had a right to compromise it upon what terms he pleased. The petitioning, or not, was entirely in his own power, and not like the present case. It is argued, that, as the plaintiff founds her claim on an illegal act, she shall not have relief in a court of justice. But she did not apply to the defendant or his agent to sign the certificate on an improper or illegal consideration; but, as the defendant insisted upon it, she, in compassion to her brother, paid what he required. If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendantis*.¹ But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other. As to the case of *Tomkins v. Bernet*, it has been often mentioned, and I have often had occasion to

¹ "The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party (*Simpson v. Bloss*, 7 Taunt. 246; *Frivaz v. Nichols*, 2 C. B. 501)."—MELLOR, J., in *Taylor v. Chester*, L. R. 4 Q. B. Div. 309, 314.

"It is argued on the plaintiff's behalf that the claim which he makes is for money had and received, traced distinctly to Thaxter's hands, and held by a contract tainted with no illegality; that the defendant in order to resist

look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make anything of it. One book says it was determined by Lord HOLT; another, by Lord TREBY. Certain it is, it was only a *Nisi Prins* case. I think the judgment may have been right, but the reporter, Salkeld, not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid, in part of principal and legal interest upon an usurious contract; and therefore, the action would not lie, for so far as principal and legal interest went, the debtor was obliged in natural justice to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who from mere necessity pays more than the other can in justice demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall retain; though it is in order to prevent this oppression and advantage taken of the necessity of others, that the law has made it penal for him to take! This kind of reasoning is equally applicable to the case of a bailiff who takes garnish-money from his prisoner. It is wrong for the bailiff to take it, and it is therefore wrong for the other to tempt him, and *volenti*, etc. and therefore he shall not recover it back; but this has been determined otherwise. The case of money given to a solicitor to bribe a custom-house officer, cited in that of *Tomkins v. Bernet*, is against his own agent, and, therefore, he cannot recover. But the present is the case of a transgression of a law made to prevent oppression, either on the bankrupt, or his family, and the plaintiff is in the case of a person oppressed, for whom money has been extorted, and advantage taken of her situation and concern for her brother. This does not depend on general reasoning only; but there are analogous cases, as that of *Astley v. Reynolds*, B. R. M. 5 Geo. 2, 2 Str. 915. There, the plaintiff having pawned some goods with the defendant for £20 he refused to deliver them up, unless the plaintiff would pay him £10. The plaintiff had tendered £4, which was more than the legal interest amounted to; but, finding that he could not otherwise

the claim is obliged to set up an illegal agreement, and rely upon it, and that this necessity is the test as to the equality of the delict. However ingenious this suggestion may be, it can hardly prevent the court from taking the whole transaction together and considering what it is in substance and effect. The application of the maxim *in pari delicto*, etc., does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings. In practice, it is usually insisted upon by the defendant in answer to a *prima facie* case."—WELLS, J., in *Sampson v. Shaw*, 101 Mass. 145, 151." Keener's note.—Ed.

get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered. It is absurd to say, that any one transgresses a law made for his own advantage, willingly. Put the case, that a man pawns another's goods; the right owner might be obliged to pay more than the value, and would have no relief, if this action will not lie. As to the case of usury, it was decided both by Lord TALBOT, and Lord HARDWICKE, in the case of *Bosanquett v. Dashwood*, Canc. M. 8 Geo. 2, Ca. temp. Talb. 38, on a bill brought to compel the defendant to refund what he had received above principal and legal interest, that the surplus should be repaid. Upon the whole, I am persuaded it is necessary, for the better support and maintenance of the law, to allow this action; for no man will venture to take, if he knows he is liable to refund. Where there is no temptation to the contrary, men will always act right.

The jury, under his lordship's direction, found a verdict for the plaintiff, with £40 damages.¹

SOLINGER v. EARLE.

COURT OF APPEALS OF NEW YORK, 1880.

[82 *New York*, 393.]

ANDREWS, J. The complaint alleges in substance that the plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of their debt, beyond the amount to be paid by the composition agree-

¹In an action for money had and received to recover money paid in excess of the legal rate of interest upon a usurious contract, RICHARDSON, C. J., said: "That whatever has been illegally taken by the defendant may be recovered by the plaintiff, in this form of action, has not been seriously contested; indeed the law on the subject is too clear to be disputed. Cowp. 792, *Browning v. Morris*; 8 East 378, *Williams v. Hedley*." *Willie v. Green* (1821) 2 N. H. 333, 339.

In this latter case of *Williams v. Hedley* (1807) 8 East 378, it was held by Lord ELLENBOROUGH, on the authority of *Smith v. Bromley*, *supra*, and *Browning v. Morris*, *ante*, that money paid by A to B to compromise a *qui tam* action of usury brought by B against A on the ground of a usurious transaction between the latter and one E may be recovered in assumption. The prohibition and penalties of the statute 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," etc., contrary to the statute; and not upon the party paying the composition. The latter, therefore, does not stand *in pari delicto*, nor is he *particeps criminis* with the compounding informer or plaintiff.—ED.

ment. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a *bona fide* holder, and the plaintiff having been compelled to pay it brings this action to recover the money paid. The complaint also alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants knowing the facts, and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves, as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full for his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity, and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest, in making the composition. Fair dealing, and common honesty, condemn such a transaction. If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover. *Cockshott v. Bennett*, 2 Term R. 763; *Leicester v. Rose*, 4 East, 372. The illegality of the consideration upon well-settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it. *Nellis v. Clark*, 4 Hill, 429.

It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement, exacted by a creditor in fraud of the composition, and the cases of *Smith v. Bromley*, 2 Doug. 696; *Smith v. Cuff*, 6 M. & S. 160 and *Atkinson v. Denby*, 7 H. & N. 934 are relied upon to sustain this claim. In *Smith v. Bromley* the defendant, being the chief creditor of a bankrupt, took out a commission against him, but afterward finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord MANSFIELD in his judgment referred to the statute (5 Geo. 11, chap. 30, § 11), which avoids all contracts made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted and advantage taken of her situation and concern for her brother." And again: "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." In *Howson v. Hancock*, 8 Term R. 575, Lord KENYON said that *Smith v. Bromley* was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in *pari delicto*, and this remark is fully sustained by reference to Lord MANSFIELD's judgment. *Smith v. Cuff* was an action brought to recover money paid by the plaintiff to take up his note given to the defendant, for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing with the other creditors a composition. The defendant negotiated the note and the plaintiff was compelled to pay it. The plaintiff recovered. Lord ELLENBOROUGH said: "This is not a case of *par delictum*; it is oppression on the one side and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the other bows to it." *Atkinson v. Denby* was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of *Smith v. Bromley* and *Smith v. Cuff*.

It is somewhat difficult to understand how a debtor who simply pays his debts in full can be considered the victim of oppression of extortion because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in *pari delicto*. (See remark of PARKE, B., in *Higgins v. Pitt*, 4 Exch. 312.) But the cases referred to go no further than to hold that the debtor himself, or a near relative who out of compassion for him pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded

as having paid under duress and as not equally criminal with the creditor.

These decisions cannot be upheld on the ground simply that such payment is against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrong-doer to recover back money paid to another in pursuance of an agreement, illegal as against public policy. It was conceded by Lord MANSFIELD, in *Smith v. Bromley*, that when both parties are equally criminal against the general laws of public policy, the rule is *potior est conditio defendentis*, and Lord KENYON, in *Howson v. Hancock*, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract both being *particeps criminis*, an action has been maintained to recover it back.

It is laid down in *Cro. Jac.* 187, that “a man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only.” And in *Robinson v. Gould*, 11 *Cush.* 57, the rule was applied where a surety sought to plead his own coercion as growing out of the fact that his principal was suffering illegal imprisonment as a defense to an action brought upon the obligation of the surety given to secure his principal’s release. But the rule in *Cro. Jac.* has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. *Wayne v. Sands*, 1 *Freeman*, 351; *Bayley v. Clare*, 2 *Browne*, 276; 1 *Roll. Abr.* 687; *Jacob’s Law Dic.*, “*Duress.*”

We see no ground upon which it can be held that the plaintiff in this case was not in *par delictum* in the transaction with the defendants. So far as the complaint shows he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which *Smith v. Bromley* was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage, with a debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress, by reason simply of that relationship, or of the interest which he might naturally take in his relative’s affairs.

The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defence, which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer, and to

compel its cancellation. *Jackson v. Mitchell*, 13 Ves. 581. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur.

Judgment affirmed.

DAIMOUTH v. BENNETT.

* SUPREME COURT OF NEW YORK, 1853.

[15 *Barbour*, 541.]

THIS action was originally brought in a justice's court. The plaintiff alleged in his complaint that the defendant was justly indebted to him in the sum of thirty dollars, for money had and received by the defendant to the plaintiff's use. The answer denied the indebtedness, and set up matters of defence upon the merits. The justice rendered judgment in favor of the plaintiff, for the amount claimed, with costs. This judgment was affirmed by the county court. The facts of the case are as follows: The plaintiff's son William was charged by the defendant with having passed to him a ten dollar counterfeit or altered bank note; a warrant had been issued against him, and he had been arrested on said charge. While he was under such arrest, the parties to this action made an agreement, by which the plaintiff promised to pay and did pay the defendant thirty dollars, to settle the criminal prosecution against the plaintiff's son, on said charge. The defendant, in consideration thereof, agreed to let the prisoner go and not to prosecute him further on said charge, and he was accordingly discharged. Prior to commencing this action, the plaintiff called on the defendant and demanded the repayment of the thirty dollars. It also appeared from the testimony of the plaintiff's son William, that he never passed the bill to the defendant; neither had he passed any bill to him, or paid him any money at any time prior to said complaint. There was no conflict of evidence in the case. When the plaintiff closed his proof, the defendant moved for a nonsuit, on the ground that the plaintiff had failed to make out a legal cause of action, which was denied.

By the Court, CRIPPEN, P. J. This case presents the single point, whether money paid for the purpose of settling or compounding a supposed felony can be recovered back by the party paying it. It was insisted by the plaintiff's counsel that there is no statute, or principle of the common law, declaring the payment of money to compound a

felony a crime, in the party thus paying the money; that it is the taking or receiving of the money, and not the payment of it, that constitutes the offence. It is true that the statute only declares the party guilty of a crime, who knowing of the actual commission of a felony, shall take any money or property of another, upon an agreement or undertaking to compound or conceal such felony or crime, or to abstain from any prosecution thereof. 2 R. S. 4th ed. 8871, § 18, also page 875, § 12.

The offence of compounding a crime created by statute, is undoubtedly confined to the party receiving the money or property, and does not extend to the party paying it. This position of the plaintiff's counsel, however, falls far short of reaching the whole difficulty in his case. Another important principle is involved, which to my mind is a conclusive answer to this action. The contract made between the parties, and the payment of the money under it, was immoral and illegal. The statute above cited declares the party *receiving* the money under such circumstances a criminal. The common law declares all contracts to do acts that are indictable or punishable criminally, to be illegal and void. It is a fundamental rule of the common law, that whenever a contract is illegal as against morality or public policy, neither a court of law nor a court of equity will interpose to grant relief to the parties thereto. It is manifest that the contract under which the plaintiff paid his money to the defendant, was *malum in se*, involving criminality and moral turpitude; it rendered the defendant liable to indictment and criminal punishment. If a contract be evil in itself, involving criminality and moral turpitude, neither party to such contract can have any remedy against the other; nor can money paid upon such contract be reclaimed by law or in equity. Story on Cont. §§ 489, 490. The same author also lays down the rule of law, that if a sum of money be paid by way of compounding a felony, it cannot be recovered back, on the refusal of the other party to perform his part of the contract; nor can an action be maintained to enforce the performance of such contract. If the money cannot be recovered back for a refusal of the party receiving it to perform his part of the agreement, it would seem very clearly to follow, that where the contract has been fully performed as agreed upon between the parties, no action can be maintained to recover back the money. No proof was given on the trial that the defendant did not keep his agreement with the plaintiff. It appeared that nothing further was done with the criminal prosecution against the plaintiff's son; the payment of the money by the plaintiff to the defendant, put an end to the whole matter; the strong arm of the law was paralyzed thereby, and the plaintiff's son was discharged from the arrest on the warrant.

Where a contract is *malum prohibitum*—merely evil because it is prohibited by statute, and does not involve any moral turpitude or

criminality—one party may have a remedy against the other, unless they are *in pari delicto*. But no relief will be granted even in such a case if the parties are both involved in moral guilt. Agreements to do acts which are indictable or punishable criminally, or to conceal or compound such acts; or to suppress evidence in a criminal prosecution, are utterly void. Story on Cont. § 569. Also all agreements which contravene public policy are void, whether they be in violation of law or morals, or obstruct the prospective objects flowing from some positive legal injunction. Story on Cont. § 545.

The money paid by the plaintiff to the defendant was intended to obstruct, and as the proof shows, did in fact obstruct and put an end to the prosecution of the plaintiff's son, who had been accused and even arrested for a high crime. The plaintiff was a party to the agreement; he paid the money to the defendant; he was a *particeps criminis* with the defendant, connected with him in committing an act declared by statute to be criminal, and which subjected the defendant, if not the plaintiff, to criminal punishment.

Whenever a contract is forbidden by the common law or by statute, no court will lend its aid to give it effect. Chitty on Cont. 570. The same author also says that an agreement for suppressing evidence, or stifling or compounding a criminal prosecution, or proceeding for a felony or for a misdemeanor of a public nature, is void. Chitty on Cont. 582. It matters not whether the plaintiff's son was guilty or innocent of the charge made against him by the defendant; he had been arrested on a criminal warrant, charging him with a felony; while thus a prisoner the plaintiff compounded the offence and stifled the prosecution, by the payment to the defendant of the money now sought to be recovered back in this action. It was undoubtedly immoral, nay, criminal in the defendant to take the plaintiff's money under the agreement upon which it was paid to him; this, however, furnishes no legal ground to the plaintiff for recovering back the money. He is too deeply implicated in the wrong committed, by compounding the alleged felony, to command the aid of the law and of the courts, in restoring him to what he has wrongfully and foolishly paid to the defendant. There were some cases at an early day which seemed to hold the doctrine that where a party paid money upon an illegal transaction, he might recover it back again in an action for money had and received. But it has been holden in numerous cases, both in England and in this country, that in cases where money has been paid upon a consideration like that established by the proof in this case, it cannot be recovered back in an action for money had and received. In the cases of *Smith v. Bromley*, Doug. 696, and *Browning v. Morris*, Cowp. 790, Lord MANSFIELD decided that where certain acts were declared unlawful by statute, intended to protect the unwary and the ignorant from the oppression and extortion of the more designing and cunning, there, although both parties were guilty of

violating the law, yet they are not equally guilty; and in such cases the money might be recovered back by the party from whom it had been extorted, as in case of taking usury, &c. The learned judge also says that these cases are distinguishable from those which have held that money paid on account of the immorality of the consideration, involving moral turpitude, or hostile to public policy, cannot be recovered back. There are many cases which maintain the doctrine, and such no doubt is the settled law, that where a contract is made having for its ultimate purpose and intent, to aid in violating a positive law or principle of public policy, or to commit a breach of good morals, the courts will not assist in enforcing it, whatever may seem to be the justice of it as between the parties. In such a case the courts treat both parties as having trodden upon forbidden ground, equally in the wrong, and as being unworthy alike to ask for or receive their aid. In this case the parties deliberately agreed to violate the laws of the land; the plaintiff by paying and the defendant by receiving the sum of thirty dollars to compound an alleged felony; to stifle and discontinue a prosecution already commenced against the accused, for a high crime. A party who thus illegally and improperly pays away his money, and afterwards repents of his folly, and attempts by an action to recover it back, cannot receive the aid of a court of justice in such attempt.

I have come to the conclusion, from a careful examination of this case, that the plaintiff failed in establishing a legal cause of action against the defendant. The judgment of the justice's court and of the county court must be reversed, with costs of the appeal in the county court and in this court.

[OTSEGO GENERAL TERM, July 12, 1853. CRIPPEN, SHANKLAND and GRAY, Justices.]¹

¹Accord: Haynes v. Rudd (1886) 102 N. Y. 372 and the authorities cited.

In the absence of a statute permitting a recovery, it is clear on principle for the reasons given in Daimouth v. Bennett, that no recovery should be had; it seems equally clear that no recovery should be allowed, in the absence of a statute, on any unlawful executed contract when the parties stand *in pari delicto*, for in such cases the court should leave the parties where they have placed themselves, rendering aid to neither of the delinquents. If, however, the contract is executory, the court might well leave the parties to any extra-judicial remedies they may have. But suppose that the performance of the contract or agreement is secured in any way, as by a mortgage. In such a case, the illegality of the original consideration should be a good defence to foreclosure, but in the meantime the very existence of the mortgage would be a cloud on the mortgagor's title. To grant affirmative relief to the mortgagor by a bill in equity for the cancellation or delivering up of the mortgage instrument would relieve one party at the expense of the other. A failure to do so would indirectly tend to enforce the agreement; but the wisest course is, perhaps, to refuse affirmative relief in any such a case. The following cases indicate the various attitudes of the courts on questions of this

ASTLEY *v.* REYNOLDS.

KING'S BENCH, 1732.

[2 *Strange*, 915.]

IN an action for money had and received to the plaintiff's use, the case reserved for the consideration of the court was, that above three years ago, the plaintiff pawned plate to the defendant for £20 and at the three years' end came to redeem it, and the defendant insisted to have £10 for the interest of it, and the plaintiff tendered him £4, knowing £4 to be more than legal interest. That the defendant refusing to take it, they parted; and at some months' distance, the plaintiff came and made a second tender of the £4, but the defendant still insisting upon £10 the plaintiff paid it and had his goods, and now brings this action for the surplus beyond legal interest.

Per curiam, The cases of payments by mistake or deceit are not to be disputed; but this case is neither, for the plaintiff knew what he did, in that lies the strength of the objection; but we do not think the tender of the £4 will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough. We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied it must be where the party had his freedom of exercising his will, which this man had not; we must take it he paid the money relying on his legal remedy to get it back again.

The plaintiff had judgment; and the defendant dying pending the argument, judgment was ordered to be entered *nunc pro tunc*.

LINDON *v.* HOOPER.

KING'S BENCH, 1776.

[*Cowper*, 414.]

UPON a rule to show cause why a new trial should not be granted in this case, Mr. Justice ASHHURST read his report as follows: This was an action for money had and received brought by the plaintiff against

nature: *Raguet v. Roll* (1835-6) 7 Oh. pt. 1, 76; pt. 2, 70; *Williams v. Engelbrecht* (1881) 37 Oh. St. 383; *Cowles v. Raguet* (1846) 11 Oh. 38; *Pearce v. Wilson* (1885) 111 Pa. St. 14; *Atwood v. Fisk* (1869) 101 Mass. 363; *Gottwalt v. Neal* (1866) 25 Md. 434.—Ed.

the defendant Hooper, who had distrained the plaintiff's cattle. The plaintiff insisted he had a right of common, and demanded his cattle to be restored, which the defendant refused to do, unless the plaintiff would pay him 20s. for the damage done. Upon this, the plaintiff paid the money in dispute for the release of his cattle; and the action is brought for that money. At the trial the question was, whether the plaintiff was entitled to recover back the money so paid, by this species of action? My opinion was, that he could not; for it would be extremely inconvenient and hard if a defendant should upon his parol be obliged to come and defend himself against any right that a plaintiff might set up, without giving him notice; and accordingly the plaintiff was nonsuited.

Mr. *Mansfield* showed cause.

Mr. *Morris* and Mr. *Buller*, contra.

Lord MANSFIELD now stated the case from the report of Mr. Justice ASHHURST, from which I collected this additional circumstance not before mentioned; namely, that the defendant agreed to return the money if the plaintiff should make out his right; and then his lordship proceeded to deliver the opinion of the court as follows:—

The particular circumstances of a promise or agreement to return the money, if the plaintiff should make out his right, do not distinguish this case from the general question: they relate to an amicable settlement which never took place.

The question then is general: Whether the proprietor of cattle distrained, doing damage, who has paid money to have his cattle delivered to him, can bring an action for that money as had and received to his use?

Though, after the cause is brought before the jury, an objection to turn the plaintiff round, if the merits can be fully and fairly tried in the action brought, is unfavorable: yet, if founded in law, it must prevail. We were extremely loath to allow it without full consideration.

The present case is singular, and depends upon a peculiar system of strict positive law.

Distraining cattle doing damage is a summary execution in the first instance. The distrainer must take care to be formally right; he must seize them in the act; upon the spot: for if they escape, or are driven out of the land, though after view, he cannot distrain them. He must observe a number of rules in relation to the impounding and manner of treating the distress.

The law has provided two precise remedies for the proprietor of cattle which happened to be impounded.

1st, He may replevy; and, if he does, upon the avowry, he must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken. Or,

2dly, If he does not choose to replevy, but is desirous to have his

cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle; and particularly charge the money so paid by way of amends as an aggravation of the damage occasioned by the trespass. If to such an action the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges the cattle had to be there.

If instead of an action of trespass, an action to recover back the money so paid by way of amends might be brought at the election of the plaintiff, the defendant would be laid under a great difficulty. He might be surprised at the trial; he could not be prepared to make his defence; he could not tell what sort of right of common or other justification the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased; or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to elect to throw such a difficulty upon his adverse party. Besides, as applied to the subject-matter of this question, the action for money had and received could never answer the equitable end for which it was invented and deserves to be encouraged. For the point to be tried and determined in this action is, Whether the plaintiff's cattle trespassed upon the defendant's land? That may depend upon the plaintiff's right, or the defendant's right, or the fact of trespassing; or it may depend upon mere form. If the distress was irregular, the amends must be recovered back again. So that, allowing the owner of the cattle to substitute this remedy in lieu of an action of trespass would, as between the parties, be unequal and unjust, and upon principles of policy would produce inconvenience. It would break in upon that branch of the common and statute law which relates to distresses. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving posterity of the benefit of precise judgments upon record.

As to prescriptive rights of common, the money paid by way of amends is a special damage; and is always so alleged in the declaration of trespass, which in every view is the action peculiarly proper for this kind of question.

An action for money had and received is a new experiment. No precedent has been cited. This objection alone would not be conclusive; but upon principles of private justice and public convenience, we think the method of proceeding used and approved for ages, in the case of distresses, ought to be adhered to.

There is a material distinction between this and the instances alluded to at the bar, where the plaintiff is allowed to waive the trespass, and bring the action for money had and received. In those instances, the relief is more favorable to the defendant. He is liable only to refund what he has actually received, contrary to conscience and equity. In this, informalities in taking or treating the distress would avoid the amends, though the defendant had a right to distrain.

But, which is more material, in those instances, the plaintiff, by electing this mode of action, eases the defendant of special pleading, and takes the risk of being surprised upon himself. In this, he eases himself of the difficulty and precision of special pleading, and the burthen of proof consequent thereupon, and exposes the defendant to uncertainty and surprise.

The case of *Feltham v. Terry*, Pasch. 13 Geo. 3, B. R., relied on in the argument, was a case of goods taken in execution, and sold under a warrant of distress upon a conviction. The conviction was quashed; consequently there could be no justification. The plaintiff, by bringing his action for money had and received, could only recover the money for which the goods were sold. But, if trespass had been brought, the defendant must have pleaded specially, and the plaintiff might have recovered damages far beyond the money actually received from the sale of the goods. So, where goods are taken in execution which are not the property of the persons against whom execution is taken out; the owner may waive the trespass, and bring his action for the amount of the money which the goods sold for.

We think this case not within the reason of any, in which hitherto the plaintiff has been allowed to waive the trespass, and bring this action. We think, to allow it would not tend to the furtherance of liberal justice, but would be a prejudice to the defendant, and in a public view inconvenient. Therefore, we agree that the plaintiff was rightly nonsuited at the trial.

Per Cur.

Rule for a new trial discharged.¹

¹In *Gulliver v. Cosens* (1845) 1 C. B. 788, it was held that the owner cannot without tendering amends recover, in a count for money had and received, an excessive sum demanded for damage where cattle are distrained damage feasant; that the remedy is replevin or trespass, if sufficient tender is made before distress; if after distress (and before the impounding) the remedy is detainue. In the course of his judgment, TINDAL, C. J., said: "This I should be disposed to hold upon principle, and independently of the authority of *Lindon v. Hooper*, which I am unable to get over, and which I am not aware has been overruled. . . . The cases of *Knibbs v. Hall* (1794) 1 Esp. 84, and *Skeate v. Beals* (1840) 11 A. & E. 983, follow the doctrine of *Lindon v. Hooper*."

And see *Chase v. Dwinal* (1830) 7 Greenl. 134, 139; *Colwell v. Peden* (1834) 3 Watts. 327, for an explanation of the principal case.

As the title to real estate cannot be tried in an action of assumpsit, *King v. Mason* (1866) 42 Ill. 223, it follows that if the title to land be not involved, a recovery in this form of action may be had as in *Hills v. Street* (1828) 5 Bing. 37; *Newsome v. Graham* (1829) 10 B. & C. 234.—Ed.

IRVING v. WILSON.

KING'S BENCH, 1791.

[4 *Term Reports*, 485.]

THIS was an action on the case to recover the sum of £2 11s. as money had and received by the defendants to the plaintiff's use. At the trial at the last *Carlisle* assizes before THOMSON, *Baron*, it appeared that the defendants, who are custom-house officers, had seized some hams near *Carlisle*, which the plaintiff was sending in three several carts from *Scotland* to *Carlisle*. The plaintiff obtained one permit for the whole, but owing to some accident two of the carts were at the distance of two miles behind the other when the defendants met the first and demanded the permit; the driver informed them that the permit was with the other carts, which came up in an hour and a half afterwards, before the first reached *Carlisle*, but not till the officer after waiting some time without seeing the other carts had made the seizure. They were all three driven to the custom-house at *Carlisle*, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he would have no concern in the taking. And the defendants then refused to give up the carts with the cargoes, unless the plaintiff would give them £2 11s.; which he accordingly did. It was objected on the part of the defendants that the plaintiff, by this transaction with revenue officers, had incurred a penalty of £50, and that he could not recover back the money which he had paid to have the goods, which had been seized, returned to him; and the plaintiff was non-suited, with leave to move to set that non-suit aside, and to enter up a verdict for him, if this Court should be of opinion that the plaintiff could maintain this action.

A rule having been obtained on a former day by *Law* to shew cause why the non-suit should not be aside,

LORD KENYON, Ch. J. The revenue laws ought not to be made the means of oppressing the subject. Here, a permit having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the seizure, the seizure was clearly illegal. The permit, for the entire quantity, could not be separated and distributed to each of the carts. And therefore whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. Here the defendants took the money under circumstances, which could by no possibility justify them; and there-

fore this could not be called a voluntary payment: but it was extorted from the plaintiff, and in that case no notice to the defendants was necessary.

ASHHURST, J. I agree that if this money had been paid as a bribe, both parties would have been *in pari delicto*, and the plaintiff would not be entitled to recover. But here the plaintiff was in no fault whatever; this money was not paid as a bribe; for the goods were not liable to seizure. Neither was it a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power. The defendants acted right in stopping the goods at first; but when the permit came up, there was no pretence to detain them; still less to take the money. It was a payment by coercion; and which the plaintiff may recover from the defendants as money unconscientiously received by them.

GROSE, J.¹ If an officer seize goods as forfeited, he does it *colore officii*: but if he takes money for delivering up the goods, there is no pretence to say that that is done *colore officii*: and such money may be recovered back again in an action of this kind.

Rule absolute.²

OATES v. HUDSON.

COURT OF EXCHEQUER, 1851.

[6 *Exchequer*, 346.³]

ASSUMPSIT for money had and received.—Plea, non assumpsit.

At the trial, before CRESSWELL, J., at the last York Spring Assizes, it appeared, that a Mrs. Dungworth, being possessed of certain freehold property, devised the same to the plaintiff's wife, then a minor.

¹Absent, BULLER, J.

²Accord: *Ripley v. Gelston* (1812) 9 John. 201; *Clinton v. Strong*, *id.* 370; *Chase v. Dwinal* (1830) 7 Greenl. 134; *Ogden v. Maxwell* (1855) 3 Blatch. 319 (digesting the authorities); *Hooper v. Mayor* (1887) 56 L. J. Q. B. 457. And so in cases of an illegal or excessive fee exacted by sheriff for serving a writ, *Dew v. Parsons* (1819) 2 B. & Ald. 562; an illegal sum exacted by authorities for a license, *Morgan v. Palmer* (1824) 2 B. & C. 729; and so where money is illegally exacted by the custodian of documents for permission to copy the same in a case where the law only required a fee for a certified copy, *Steele v. Williams* (1853) 8 Ex. 625. And on this subject generally see, especially the sound and unanswerable dissenting opinion of STORY, J., in *Cary v. Curtis* (1845) 3 How. 236, 252-259, which influenced Congress, then in session, to repeal the obnoxious statute destroying the common-law right as appears from *Arnson v. Murphy* (1883) 109 U. S. 238.—Ed.

³This case is likewise reported in 5 *English Law and Equity*, 469, with an excellent editorial note.—Ed.

Mrs. Dungworth resided with a Mrs. Hudson, the aunt of the defendant; and after she had made the will in favour of the plaintiff's wife, she delivered to Mrs. Hudson the title deeds of her property, telling her to keep them, as she should destroy her will, and leave all her property to her. In consequence of this assurance, Mrs. Hudson had allowed Mrs. Dungworth to reside with her until her death in 1835, and had paid the expenses of medical attendance and of the funeral. It was then discovered that the will in favour of the plaintiff's wife was the only one in existence. The executors of Mrs. Dungworth received the rents of the land during the minority of the devisee, but the deeds were retained by the defendant, to whom Mrs. Hudson had delivered them as her attorney, and the expenses of the funeral, &c., had not been repaid to her. The plaintiff, having married the devisee under Mrs. Duckworth's will, made inquiries of Mrs. Hudson respecting the deeds, when she said that she would give no information unless she was paid what she had expended; and she ultimately referred the plaintiff to the defendant as her legal adviser. The plaintiff afterwards called on the defendant, and asked him to give up the deeds, when he refused to do so, except upon payment of £63, the amount of the expenses incurred by Mrs. Hudson on account of Mrs. Dungworth. The plaintiff at first objected to pay this sum; but he subsequently paid it, and obtained the deeds, at the same time saying to the defendant, "You shall hear of this again." The defendant afterwards paid over the amount to Mrs. Hudson. It was objected on the part of the defendant, that the plaintiff was not entitled to recover, on the grounds, first, that the defendant acted merely as the attorney of Mrs. Hudson; secondly, that, the defendant having no right to retain the deeds, this was a voluntary payment by the plaintiff in his own wrong. The learned Judge overruled the objections, and a verdict was found for the plaintiff.

Watson now moved for a new trial, on the ground of misdirection.—He argued, first, that the action was improperly brought against the defendant, who had merely acted as the attorney and agent of Mrs. Hudson; secondly, that the defendant having no right whatever to retain the deeds, the money was paid by the plaintiff voluntarily and in his own wrong.

PARKE, B.—There ought to be no rule. If the money had been paid to Mrs. Hudson, or to the defendant for her, voluntarily, and in order to satisfy the funeral and other expenses, it could not have been recovered back; in fact, however, it was not so paid, but only for the purpose of getting possession of the deeds. In *Atlee v. Backhouse*, 3 M. & W. 633, it is correctly laid down, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that where a sum of money is paid simply to obtain possession of goods which are wrongfully detained, that may be recovered back, for it is not a voluntary payment. *Pratt v. Vizard*,

5 B. & Ad. 808, E. C. L. R. vol. 27, is an authority to the same effect. Here the money was not paid to the defendant in his character of agent, so as to prevent the plaintiff from having a remedy against him. *Snowden v. Davis*, 1 Taunt. 359, decided, that, in order to enable an agent to set up the defence that he has paid over the money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over. There MANFIELD, C. J., points out the distinction between such a case and where a person pays money under compulsion to redeem his goods, and not with intent that the money should be paid over to any one in particular. So that the present case does not fall within the rule as to payment to an agent, but it is a payment under a species of duress, and the person who received the money is bound to pay it back.

POLLOCK, C. B., PLATT, B., and MARTIN, B., concurred.

Rule refused.¹

TUTT v. IDE.

CIRCUIT COURT OF THE UNITED STATES, 1855.

[3 *Blatchford*, 249.]

DEFENDANTS as common carriers agreed with plaintiffs to receive at Boston and carry to St. Louis 1,216 cases of boots and shoes at the rate of \$1.25 freight per hundred pounds. The goods were carried as per agreement to St. Louis, but the defendants refused to deliver them to the plaintiffs unless the plaintiffs paid the sum of \$2,202.57.

¹“Money paid to obtain the possession of goods illegally and wrongfully detained, may be recovered back in assumpsit for money had and received. *Bates v. The New York Ins. Co.* 3 Johnson’s Cases, 238; *Ripley v. Gelston*, 9 Johnson, 201; *Clinton v. Strong*, *ib.* 370; *Hearsey v. Pruyn*, 7 *id.* 179; *Chase v. Dwinal*, 7 Greenleaf, 134; *Chase v. Taylor*, 4 Harris & Johnson, 54; *Henry v. Chester*, 15 Vermont, 460; *Marriott v. Brune*, 9 Howard, 619; *Maxwell v. Griswold*, 10 *id.* 242; *Hendley v. Call*, 30 Maine, 9; *Joyner v. The Third School District*, 3 Cushing, 567. And this rule applies to a payment to a public or private officer or agent. *Ripley v. Gelston*; *Frye v. Loekwood*, 4 Cowen, 454; unless it is made for the use of the principal, and paid over to him without notice of the intention to reclaim it.

“It has been said that where a restraint is imposed in good faith, with a view to enforcing a supposed legal right, money paid to remove it cannot be recovered back. *Lindon v. Hooper*, Cowper, 414; *Atlee v. Backhouse*, 3 M. & W. 633, 646; *Colwell v. Pedon*, 3 Watts, 327; *Webber v. Aldrich*, 2 New Hampshire, 461; but in these cases, the goods had been distrained for rent, and were within the rule, that a payment made under compulsion of legal process cannot be disputed. *Newell v. March*, 8 Iredell, 441; unless on the

being \$1,087.91 more than the sum for which the defendants had agreed to convey and deliver the goods. To obtain possession of their goods the plaintiffs paid the sum demanded, and brought suit to recover the sum paid in excess. To this money count there was a general demurrer and joinder.¹

HALL, J. It was insisted by the defendants, upon the argument, that the plaintiffs paid the excess which they seek to recover back, without legal coercion,—not by mistake, but with a full knowledge of the facts: and that the payment was therefore voluntary, and could not be recovered back. On the other hand, the plaintiffs insisted that the payment was compulsory, and that they were entitled to recover back the excess, beyond the sum due under the contract, which was paid by them to obtain possession of their goods.

It was conceded by the counsel for the defendants, that the case of *Astley v. Reynolds*, 2 Strange, 915, was in point as an authority for the plaintiffs; but he insisted that that case had been overruled by the Courts of this State, and that the rule of law in this State was well established, and was directly opposed to the doctrines of that case.

The earliest case cited to sustain this position is that of *Hall v. Shultz*, 4 Johns. 240. The case of *Astley v. Reynolds*, and also the case of *Knibbs v. Hall*, 1 Esp. 84, in which the principle of the case of *Astley v. Reynolds* was said to have been overruled, were referred to in that case. But SPENCER, J., in delivering the opinion of the Court, without adverting to the case of *Bates v. The New York Ins. Co.*, 3 Johns. Cas. 238, which will be hereafter referred to, and “with-
ground of a mistake of facts. *Pool v. Allen*, 7 Iredell, 120; see 2 Smith L. C., 4th Am. ed., 338, 344.”

So where a mortgagor pays the mortgage debt and the mortgagee refuses to deliver the title-deeds except upon payment of an unfounded claim, *Wakefield v. Newbon* (1844) 6 Q. B. 276; or where a mortgagee of land threatens to sell in foreclosure under a power of sale unless an exorbitant sum is paid, *Close v. Phipps* (1844) 7 M. & G. 586; or where a corporation refuses to make a transfer of stock unless the assignee of the stock pays a debt due from plaintiffs' assignor to the corporation, *Bates v. N. Y. Ins. Co.* (1802) 3 Johns. Cas. 238 (but see *De La Cuesta v. Ins. Co.* (1890) 136 Pa. St. 62, contra); so where a broker in possession of goods distrained for rent demands, as a condition for extension of time, an undertaking to pay expenses of keeping a man in possession and the undertaking is given and enforced, *Hills v. Street* (1828) 5 Bing. 37; so where a broker in possession of goods refuses to deliver to the owner, goods unsold unless all commissions for goods sold as well as unsold are paid, and the owner thereupon pays the entire claim under protest, *Briggs v. Boyd* (1874) 56 N. Y. 289; so where executors refused to deliver bonds unless certain commissions (disallowed by the court) were paid, *Scholey v. Mumford* (1875) 60 N. Y. 498, 501 (where the authorities are collected). And see *Cobb v. Charter* (1865) 32 Conn. 358 (digesting authorities).—Ed.

¹The statement of the case is slightly abridged.—Ed.

out undertaking to pronounce between the cases cited," Astley v. Reynolds and Knibbs v. Hall, declared that the case then before him differed materially from both. In the case then under consideration, the defendants had purchased the lands of the plaintiff on execution, under a verbal agreement to convey them to him on the repayment of the amount advanced, with interest, and a reasonable compensation for the defendants' trouble. Afterwards, when the plaintiff applied to have the agreement reduced to writing, they required him to execute an agreement in which the compensation for their trouble was fixed at \$300, which was deemed extortionate and unjust. The agreement was executed, and the \$300 subsequently paid, and the conveyance to the plaintiff made; and he then brought his action to recover back the \$300. In concluding his opinion, Mr. Justice SPENCER said: "On the ground that there existed no legal right on the part of the plaintiff to demand or enforce a conveyance, that he must be considered in the light of any other purchaser, and that the defendants might make their own terms, and that the plaintiff has voluntarily and with his eyes open, fixed the compensation claimed by the defendants, and paid them the money, he can have no claim to call on the Court to aid him in getting rid of what he conceives an unconscientious advantage. But, if there did exist a legal remedy to enforce a reconveyance, as the measure of the defendants' claim to compensation rested in arbitrary discretion, the plaintiff, by voluntarily acceding to the terms proposed by the defendants, has lost any right to call on a jury to relieve him from an allowance deliberately fixed by himself." It is, I think, quite clear that this case of Hall v. Shultz does not overrule the case of Astley v. Reynolds, or the case of Bates v. The New York Ins. Co., above referred to; and I think the same remark applies to the cases, cited by the defendants' counsel, of Ripley v. Gelston, 9 Johns. 201; Clarke v. Dutcher, 9 Cowen, 681; Supervisors of Onondaga v. Briggs, 2 Denio, 39, 40; Wyman v. Farnsworth, 3 Barb. S. C. R. 371; and Elliott v. Swartwout, 10 Peters, 137.

The manuscript opinion of Mr. Justice NELSON, in the case of Converse v. Coit, appears to favor, if it does not directly sanction, the position assumed by the defendants. But, on looking into the bill of exceptions in that case, it appears that the flour on which the excessive charges of freight were demanded and paid had been delivered two or three days prior to such payment; and that there was no formal demand made of the flour, and no refusal to deliver it up, and no threat made of detaining the flour because of a refusal to pay. The question now raised was not presented in that case, and, therefore, the decision therein is not an authority for the position assumed by the defendants in this case.

The case of Astley v. Reynolds was decided by the King's Bench, in Michaelmas Term, 5 Geo. 2 (1732). It is admitted that, if that case is to be followed, the question presented by the demurrer must be

decided in favor of the plaintiffs. But, it is contended, as before stated, that *Astley v. Reynolds* has been overruled by the Supreme Court of this State, in the cases before cited. Those cases have been fully considered, and, having reached the conclusion that they have not expressly overruled the case in 2 Strange, I now propose to refer to other cases in the Courts of this and other States and in England, which are supposed to bear directly upon this question.

In *Bates v. The New York Ins. Co.*, 3 Johns. Cas. 238, decided in 1802, the plaintiff had purchased, from one Norman Butler, fifty shares of the stock of the defendants, subject to some future calls. Those calls were paid by the plaintiff, and he became entitled to a transfer of the stock upon the books of the Company. The defendants refused to transfer this stock to the plaintiff until the plaintiff paid a debt due to them from Butler, the original owner of the shares. This the plaintiff paid. He afterwards brought his action to recover it back; and the Court held, after a verdict taken subject to the opinion of the Court upon the facts stated, that the plaintiff was not liable for the payment of \$465 of the amount paid by him to procure the transfer, and that he was therefore entitled to recover back that amount, in an action for money had and received. THOMPSON, J., delivered the opinion of the Court, and referred with approbation to *Astley v. Reynolds*, and to *Irving v. Wilson*, 4 T. R. 485, and also to *Munt v. Stokes*, *Id.* 561, in which he said the principles of the case of *Astley v. Reynolds* were fully recognized and adopted.

In *Fleetwood v. The City of New York*, 2 Sandf. S. C. R. 479, Mr. Justice SANDFORD refers with approbation to the case of *Chase v. Dwinal*, 7 Greenl. 134, and says: "There are cases of duress of personal property, in which payments for its relief are deemed involuntary, and the money may be recovered back. Most of these cases have arisen upon seizures of goods under revenue or excise laws, and by public officers acting under process or warrant of law. The principle has been extended, occasionally, to cases where bailees or others, who came into the possession of goods lawfully, have exacted more than was due, before they would relinquish such possession. It is founded upon the movable and perishable character of the property, and the uncertainty of a personal remedy against the wrong-doer."

The general rule undoubtedly is, that this action for money had and received, being an equitable action, lies whenever money has been received by the defendant, which, *ex aquo et bono*, belongs to the plaintiff. *Buel v. Boughton*, 2 Denio, 91.

In the case of *Chase v. Dwinal*, 7 Greenl. 134, it was held, that money paid to liberate a raft of lumber detained in order to exact an illegal toll, might be recovered back. WESTON, J., in delivering the opinion of the Court, refers to the remark of SPENCER, J., in *Hall v. Shultz*, that *Astley v. Reynolds* had been overruled by Lord KENYON

in *Knibbs v. Hall*, and says: "There" (in *Knibbs v. Hall*) "the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him, to avoid a distress which was threatened. Lord KENYON held this to be a voluntary payment and not upon compulsion, as the party might have protected himself from a wrongful distress by replevin. His Lordship does not advert to the case of *Astley v. Reynolds*; and subsequently, in *Cartwright v. Rowly*, before cited" (from 2 Esp. 723), "he refers, with approbation, to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and Court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but, it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained."

In *Chase v. Taylor*, 4 Harr. & Johns. 54, it was held, that money improperly demanded as a condition of the release of a ship pledged to the party receiving the money, might be recovered back, in an action for money had and received.

The cases of *Alston v. Durant*, 2 Strobbart, 257, and *Richardson v. Dunean*, 3 N. H. 508, are also strongly confirmatory of the case of *Astley v. Reynolds*; and other cases of a similar character are to be found in the reports of the different States.

In respect to the English cases, it may be observed, that the decision in *Astley v. Reynolds*, made in the King's Bench sitting *in banco*, ought not to be considered as overruled by a *nisi prius* decision, though made by a judge of such distinguished ability and learning as Lord KENYON. But the case of *Astley v. Reynolds* and not that of *Knibbs v. Hall* has, since the decision of Lord KENYON, been followed in England.

In 1827, in *Shaw v. Woodcock*, 7 Barn. & Cress. 73, it was held by Lord Chief Justice TENTERDEN, and Justices BAYLEY, HOLROYD and LITLEDALE, of the King's Bench, that a payment made in order to obtain possession of goods or property to which a party was entitled, and of which he could not otherwise obtain possession at the time, was a compulsory and not a voluntary payment, and might be recovered back. In 1844, in the case of *Parker v. The Great Western Railway Co.*, 7 Mann. & Gr. 253, it was held by the Court of Common Pleas in England, Chief Justice TINDAL delivering the judgment of the Court, that money paid by the plaintiff to a common carrier, to obtain possession of the plaintiff's goods, beyond the amount to which the carrier was entitled, might be recovered back: such payment not being considered as a voluntary payment. And this doctrine I understand to have been again acted upon in the Court of Exchequer, in *Parker v. The Bristol & Exeter Railway Co.*, 7 Eng. Law & Eq. R. 528, in the year 1851.

I am entirely satisfied, as well upon the authority of these cases, as upon principle, that the payment alleged in the count demurred to, cannot be held to have been a voluntary payment. The demurrer is, therefore, overruled.¹

CHANDLER v. SANGER AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1874.

[114 *Massachusetts*, 364.]

CONTRACT for money had and received. At the trial in the Superior Court, before ROCKWELL, J., the plaintiff, in opening his case, stated that he expected to prove that the plaintiff was a dealer in ice, and furnished ice each week-day to parties in Boston, under contracts to furnish a certain amount daily, upon all week days; that his custom was to have his carts loaded by twelve o'clock on Sunday night, in order to start early Monday morning; that any failure on the part of the plaintiff to furnish his customers with ice on Monday would be a great injury to him; that Monday morning, July 12, 1869, he had standing in his sheds at Brighton, adjoining his ice-house, five heavy two-horse teams loaded with ice, ready to start for Boston before light; that ~~the defendant Sanger held his promissory note and had proved it against his estate in insolvency; that in the insolvency proceeding he had obtained his discharge; that the defendants knew these facts:~~

"The case was subsequently tried, on issues of fact, before HALL, J., and a jury, when a verdict was found for the plaintiffs, the Court ruling, as to the law, in accordance with this opinion. On a motion, before NELSON, J., made by the defendants, for a new trial, he said (September 1st, 1859): "I am entirely satisfied with the opinion of Judge HALL in this case, delivered on the decision of the demurrer to the declaration, and which he followed on the trial of the issue of fact, and must, therefore, deny the motion for a new trial, and give judgment for the plaintiffs upon the verdict. The opinion in the case of *Converse v. Coit*, delivered by me in the State Court, and referred to on the argument, turned upon a different question from the one involved in this case."

Accord: *Ashmole v. Wainright* (1842) 2 Q. B. 837; *Parker v. Gt. Western Railway Co.* (1844) 7 M. & G. 253 (authorities collated and analyzed by TINDAL, C. J., pp. 293, 294); *Harmony v. Bingham* (1854) 12 N. Y. 99; *Beckwith v. Frisbie* (1860) 32 Vt. 559 (digesting authorities).

And on this whole subject, see the opinion of GREEN, J., in *W. Va. Transportation Co. v. Sweetzer* (1885) 25 W. Va. 434, 441-465—one of the most elaborate and carefully considered discussions to be found anywhere in the reports—in which the authorities are collected and analyzed in a masterly way.—ED.

that the defendant Sanger and the other defendant, who was an attorney-at-law, brought an action on this promissory note, under circumstances which would satisfy the jury that the action was commenced and carried on by them fraudulently, with the purpose of extorting money from the plaintiff by duress, under color of legal process: that in pursuance of this purpose, they went about two o'clock on Monday morning with a writ in the hands of an officer and made an attachment of the carts, horses, and harnesses; that the attorney-at-law, who had been with the officer in making the attachment, went to the plaintiff's house and informed him of the attachment, and told him that none of the property so attached could go to Boston unless the claim should first be settled by the payment of \$300: that the plaintiff told the attorney that he did not owe anything, and said he would dissolve the attachment by giving a bond: that the attorney then told him that it would take three days to dissolve it, and that for that time the property would be held under it, and that his discharge in insolvency did not cut off the claim: that the plaintiff believed these statements, and being ignorant of the method of dissolving attachments and being in fear of great loss in his business, to relieve the property from attachment he paid the \$300 to the attorney under protest, stating that he should claim and enforce his rights, and recover back the money.

The presiding judge being of the opinion that these facts, if proved, would not sustain the action, so ruled; whereupon, by consent of the parties, he reported the case to this court for their decision. It was agreed that if the court should be of opinion that these facts, if proved, were sufficient to sustain the action, then it was to stand for trial; otherwise judgment was to be entered for the defendants.

GRAY, J. This is not an action of tort, to recover damages for malicious prosecution, or abuse of legal process, but an action of contract, in the nature of assumpsit, for money had and received by the defendants, which they have no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. *Watkins v. Baird*, 6 Mass. 506; *Shaw, C. J., in Preston v. Boston*, 12 Pick. 7, 14; *Benson v. Monroe*, 7 Cush. 125, 131; *Carew v. Rutherford*, 106 Mass. 1, 11, *et seq.*; *Richardson v. Duncan*, 3 N. H. 508; *Sartwell v. Horton*, 28 Vt. 370; *Gibson, C. J., in Colwell v. Peden*, 3 Watts, 327,

328; *Cadaval v. Collins*, 4 A. & E. 858; *PARKE, B.*, in *Oates v. Hudson*, 6 Ex. 346, 348; and in *Parker v. Bristol & Exeter Railway Co.*, 6 Ex. 702, 705.

*New trial ordered.*¹

JOANNIN *v.* OGILVIE.

SUPREME COURT OF MINNESOTA, 1892.

[49 *Minnesota*, 564.]

OGILVIE was owner of real estate in Duluth, and erected certain buildings on his property. One Thompson furnished doors, sash and other goods for the buildings, and Ogilvie only paid for the various goods bought from Thompson. It appeared that Thompson had purchased these goods with others from Joannin, but Ogilvie knew nothing of this fact.

Joannin made and filed for record a lien statement, claiming to be due him from Thompson \$682.50, and that he was a contractor with Ogilvie to furnish material for the buildings on the lots. This claim was incorrect and the lien invalid. Ogilvie was largely indebted, and pressed for money, and was negotiating for a loan of \$15,000, to be secured by his mortgage on this real estate. The lenders refused to make the loan unless this lien was removed. Plaintiffs refused to discharge it of record unless Ogilvie paid Thompson's debt to them. He paid it under protest March 19, 1890, and in this action asked judgment against plaintiffs for the amount so paid, and for a return of his stocks.²

MITCHELL, J. The findings in this case are so specific as to constitute a sufficient statement of the facts, and an examination of the record satisfies us that, on all material points, they are fully justified by the evidence.

¹The doctrine is well established that payment to protect one's business is not voluntary and so may be recovered in an assumpsit count. *Button v. St. Louis* (1882) 77 Mo. 47; *Panton v. Duluth Gas & Water Co.* (1892) 50 Minn. 175; *Lehigh Coal & Navigation Co. v. Brown* (1882) 100 Pa. St. 338; *Swift Co. v. U. S.* (1883) 111 U. S. 22.

Carew v. Rutherford (1870) 106 Mass. 1, cited in the principal case, is interesting from the fact that the injury threatened to plaintiff's business arose from a conspiracy to strike, and the money extorted to protect plaintiff's business was held to be recoverable. The declaration counted in tort and assumpsit, and the court allowed a recovery, but it is not entirely clear upon which count. The authorities are cited and carefully considered and there can be no reasonable doubt of the correctness of the decision.—Ed.

²Statement substituted for the original report and immaterial facts are omitted.—Ed.

That plaintiff's claim of a lien on the land of the defendant Ogilvie was wholly unfounded is conceded. *Merriman v. Jones*, 43 Minn. 29 (44 N. W. Rep. 526). Therefore the only question is whether the payment of the claim was voluntary, or whether it was made under such compulsion or constraint that it is to be deemed in law involuntary, so that the money may be recovered back.

In examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoiding of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand and with the great liberality of the equity rule on the other. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defence to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force.

The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice. Pol. Cont. 556.

In *Fergusson v. Winslow*, 34 Minn. 384 (25 N. W. Rep. 942), this court held that "when one in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back, at least when such detention is attended with circumstances of hardship or serious inconvenience to the owner." Again, in *De Graff v. Ramsey Co.*, 46 Minn. 319 (48 N. W. Rep. 1135), it was said: "There is a class of cases where, although there be a legal remedy, a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice;

where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him to comply with the illegal demand. In such cases, his act will be deemed to have been done under duress, and not of his free will." *Fergusson v. Winslow, supra*; *State v. Nelson*, 41 Minn. 25 (42 N. W. Rep. 548); and *Mearkle v. County of Hennepin*, 44 Minn. 546 (47 N. W. Rep. 165),—are instances where the danger of irreparable or serious prejudice was considered so great and the legal remedy so inadequate as to practically leave the party no choice but to comply with the illegal demand, and hence to render the payment involuntary. It may be stated generally that when ever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience. *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. 297.

As was said as long ago as *Astley v. Reynolds*, 2 Strange, 915, "plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be when the party has his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

It has been said that, to constitute a payment under duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." *Brumagim v. Tillinghast*, 18 Cal. 265; *Radich v. Hutchins*, 95 U. S. 210.

Beyond these and similar statements of general principles, the courts have not attempted to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or involuntary. From the very nature of the subject, this cannot be done, as each case must depend somewhat upon its own peculiar facts. The real and ultimate fact to be determined in every case is whether or not the party really had a choice,—whether "he had his freedom of exercising his will." The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line. For example, payment of an illegal tax, in order to prevent issuing a warrant of distress in the nature of an execution, and upon which the party has no day in court or opportunity to defend, is held not

voluntary. Such were the cases of Board of County Com'rs of Dakota Co. v. Parker, 7 Minn. 267 (Gil. 207), and Preston v. Boston, 12 Pick. 7. So, also, the payment of an illegal demand in order to obtain possession of personal property detained otherwise than by judicial process, and where the immediate want of the property was so urgent that an action of replevin "would not do the owner's business." Such was the case of Fergusson v. Winslow, *supra*. Also the payment of an illegal tax in order to get a deed on record, as in the case of State v. Nelson, *supra*; or the payment of illegal fees in order to secure the exercise of its jurisdiction by the probate court in the administration and settlement of an estate, where the delay was liable to result in serious loss, as in the case of Mearkle v. County of Hennepin, *supra*.

On the other hand, it is well settled that the mere refusal of a party to pay a debt or to perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities. Such was the case of Cable v. Foley, 45 Minn. 421 (47 N. W. Rep. 1135); also Miller v. Miller, 68 Pa. St. 486; Hackley v. Headley, 45 Mich. 569 (8 N. W. Rep. 511); Goebel v. Linn, 47 Mich. 489 (11 N. W. Rep. 284); and Silliman v. United States, 101 U. S. 465,—cited by plaintiff. It will be noted that in the last case referred to the party entered into the new contract, not for the purpose of obtaining possession of his property (the barges), but to secure payment of money due him from the government.

So, also, the fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand will not render its payment compulsory, at least in the absence of fraud on part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: Forbes v. Appleton, 5 Cush. 115; Benson v. Monroe, 7 Cush. 125; Taylor v. Board of Health, 31 Pa. St. 73; Oceanic Steam Nav. Co. v. Tappan, *supra*.

Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the state. To this class belong the following cases cited by plaintiffs: Cook v. Boston, 9 Allen, 393; Emery v. Lowell, 127 Mass. 138; Mays v. Cincinnati, 1 Ohio St. 268; Custin v. City of Viroqua, 67 Wis. 314 (30 N. W. Rep. 515).

The same has been held as to money paid under threats of distress for rent, in the absence of fraud or any other fact, except that no rent was due. The theory seems to be that the party's remedy is to replevin, and try the question of liability at law. Such was the case of *Colwell v. Peden*, 3 Watts, 327, also cited by plaintiffs.

But all these cases in which the payment was held voluntary are clearly distinguishable from the case at bar. The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need.

It was this active interference with the property, and not the necessitous financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of a judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have interposed his defence in these proceedings. But this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it. But with a large indebtedness hanging over him, an overdue mortgage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, \$13,000 of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of *Fergusson v. Winslow*, *supra*, but that the payment would be held to have been made under duress. But while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property.

It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often

as with respect to goods and chattels. But the question in all cases is, was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. *Fraser v. Pendlebury*, 31 Law J. C. P. 1; *Pemberton v. Williams*, 87 Ill. 15; *Close v. Phipps*, 7 Man. & G. 586; *White v. Heylman*, 34 Pa. St. 142; *State v. Nelson*, *supra*.

Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiff's claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

Judgment affirmed.¹

2. UNDER COMPULSION OF LEGAL PROCESS.

JACK v. FIDDES.

COURT OF SESSIONS, SCOTLAND, 1661.

[*Morrison's Dictionary of Decisions*, 2923.]

THERE being a decreet recovered by another Fiddes against Jack, before the English officers at Leith, in the beginning of the year 1652, for a sum of money; whereupon Jack being incarcerated, he was forced to give a bond to this defender, who was assignee constitute by this Fiddes, and to give his brother cautioner therein Upon which new bond Jack was also charged, and an act of warding followed thereupon; the bond being registrate in the town court-books of Edinburgh. Jack gave in a bill to the Parliament, which was remitted to the Session, desiring repetition of the sum. It was *alleged*. There could

¹The following are some additional cases: *Woodham v. Allen* (1900) 130 Cal. 194; *Schiffer v. Adams* (1889) 13 Col. 572; *Brooks v. Berryhill* (1863) 20 Ind. 99; *Ingalls v. Miller* (1889) 121 Ind. 188; *Baldwin v. Hutchinson* (1893) 8 Ind. App. 454; *Thorn v. Pinkham* (1891) 84 Me. 101; *Parkes v. Laneaster* (1892) 84 Me. 512; *Canfield Salt & Lumber Co. v. Manistee* (1894) 100 Mich. 406; *Weston v. County of Luce* (1894) 102 Mich. 528; *Mearkle v. County of Hennepin* (1900) 44 Minn. 546; *Bocchino v. Cook* (1902) 67 N. J. L. 467; *Smyth v. Mayor* (1890) 11 N. Y. Supp. 583; *Redmond v. Mayor* (1890), 11 N. Y. Supp. 782; *Buford v. Lonergan* (1889) 6 Utah, 301; *Nutter v. Sydenstricker* (1877) 11 W. Va. 535. And on the subject of duress generally, see an elaborate note in 26 Am. Dec. 374-378.—Ed.

be no *condictio indebiti*, where there was *obligatio naturalis* or *civilis* preceding: *Ita est*, there was not only a civil obligation by the sentence recovered, but by the new bond granted to the assignee, who was not obliged to know, how, or what way the sentence was obtained: And Jack having transacted therefor, he could not now be heard to quarrel the transaction against the assignee, or to crave repetition. It was *answered*, That the officers' sentence was most unjust, both in the matter and the manner, they having no civil jurisdiction: And the same defender was assistant to the cedent in recovering of the sentence, as he will not deny. Likeas, the pursuer was forced to grant the new bond to him as assignee, and pay the new bond to free himself of prison; there being no civil judicatory, where he could have any remedy; the English Judges for administration of justice not being then established, who sat not till June 1652. And though it had been sitting, it could not have been expected that Jack could have helped himself, by any course they would have taken, for annulling the sentence of the English officers. Likeas, by an act of the late Parliament, all sentences pronounced by the Englishes, since their in-coming, are appointed to be reviewed.

The Lords repelled the allegiance, and sustained repetition.

In presentia.

MOSES v. MACFERLAN.

KING'S BENCH, 1760.

[2 *Burrow*, 1005.]

See *ante* p. 4 for a report of the case.

JAMES v. CAVIT'S ADMINISTRATOR.

CONSTITUTIONAL COURT OF SOUTH CAROLINA, 1807.

[2 *Brevard*, *old ed.* *174.]

SUMMARY process, in Sumter district, before BREVARD, J. The petition stated that the defendants had sued the plaintiff for certain goods sold and delivered; and that at the trial, the plaintiff had mislaid a receipt or release from Cavit, which he had given, in his lifetime, to the plaintiff, acknowledging satisfaction in full for the same goods, and was unable to produce the same, in consequence of which

judgment had been obtained against him; and that he had since found the said receipt, and therefore claimed to recover back the money, so unjustly recovered in the former action of the defendants against him. It appeared that the plaintiff had moved the court, soon after the judgment had been obtained against him, which had been obtained in a summary way by petition and process, to open his judgment, and let him into his defence; but WATIES, J., who presided, refused to grant the motion.

SIMONS, for the defendants in the present case, objected to the jurisdiction of the court, and insisted that the court could not overhaul the former judgment; and that the plaintiff was estopped from claiming money which had been duly recovered in a legal course; and that it was his own folly, or neglect, if he suffered a decree to pass against him for money which he had paid, and had a receipt for.

Broun, for the plaintiff. The defendants have received money which *ex aquo et bono* they ought to refund; and, as no writ of error lies in this country, there is no other relief. A contract to refund may be implied, though the money was recovered by an adverse suit. This was decided in the case of *Moses v. Macfarlen*, 2 Burr. 1005. The remedy is founded on the equity of the case, *quasi ex contractu*, and is more particularly to be encouraged under the summary jurisdiction of this court, as the parties under the summary jurisdiction are entitled to the benefit of all such matters as would avail in a court of equity.

The court decreed in favor of the defendants, upon the ground that money recovered by the judgment of the court of competent jurisdiction, cannot be recovered back in a new action, though the error or mistake in that judgment may be made manifest; and that the merits of a judgment cannot be examined into, and questioned in any original suit in the court of common pleas. Till it is set aside, or reversed, it must be conclusive as to the subject-matter of it, to all intents and purposes. This is the language of Lord MANSFIELD, in the case of *Moses and Macfarlen*. The ground of relief in that case was not that the judgment was wrong, but because the plaintiff could not avail himself of the matter on which his claim was founded, in his defence in the action against him; because the court of conscience, which adjudged against him, had no cognizance of the collateral matter set up in his defence. That obstacle did not prevent the plaintiff, in this action, from the benefit of his receipt in the action against him; and if he was unable, from accident or misfortune, to produce it on that occasion, this certainly is not the proper form of relief, if he is entitled to any. If he had been guilty of *laches* in the matter, he cannot be relieved at all. *Vigilantibus et non dormientibus leges subveniunt.*

The motion in this court, was on the ground of mistake as to the law, and was supported by *Richardson*, of counsel, for the plaintiff.

But the court unanimously discharged the motion, and confirmed the determination of the district court. *Transit in rem judicatem*.¹

TILTON v. GORDON.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1817.

[1 *New Hampshire*, 33.]

THIS was an action of assumpsit, in which the plaintiff declared in several counts for the same cause of action. The last of these counts, which sets out the facts of the plaintiff's case very fully, alleges, that on the 31st of March, 1801, the plaintiff gave to the defendant two promissory notes, for upwards of two hundred dollars each, and that on the 7th of April, 1803, the plaintiff delivered to the defendant a yoke of oxen, at the price of fifty-five dollars, in part payment of the notes: that the defendant promised the plaintiff to endorse the price of the oxen on the notes, but neglected to do so, and afterwards brought a suit upon the notes: that the plaintiff, relying upon

¹Accord: *Kirklan v. Brown's Adminis.* (1843) 4 *Humph.* 174; *White v. Ward* (1812) 9 *Johns.* 232; *Loomis v. Pulver* (1812) *id.* 244.

In the earlier case of *Marriott v. Hampton* (1797) 7 *T. R.* 269, identical as to its facts, the same result was reached. In England the courts have refused to apply the rule in cases in which the one securing the judgment does not act in good faith. *Ward v. Wallis* [1900] 1 *Q. B.* 675. But in America the question of fraud has been held immaterial. *Walker v. Ames* (1823) 2 *Cow.* 428. The principle underlying the rule is discussed briefly in *Moore v. Vestry of Fulham* [1895] 1 *Q. B.* 399.

But modifying the strict principle, after part payment of a judgment founded on a usurious contract, an equity court may set aside the judgment, but only on condition that the defendant pay the principal with legal interest. *Hindle v. O'Brien* (1809) 1 *Taunt.* 413. But when a new security is given for a judgment founded on a usurious contract, the court has refused to interfere. *Thatcher v. Gammond* (1815) 12 *Mass.* 268. In *Federal Ins. Co. v. Robinson* (1876) 82 *Pa. St.* 357, the court held that where the payment of usurious interest was made upon process of execution and there was no allegation of actual collusion to evade the statute, it was not recoverable in a new suit. The court there said: "Money collected or paid upon lawful process of execution cannot be recovered back, though not justly or lawfully due by the defendant in the execution to the plaintiff. The authorities for this position are many and clear. 1 *Selwyn's N. P.* 82; 1 *Archbold's N. P.* 267; *Rapelje v. Emory*, 2 *Dallas*, 51, 231; *Herring v. Adams*, 5 *W. & S.* 459; *Mann's Appeal*, 1 *Barr.* 29; *Boas v. Updegrove*, 5 *id.* 516. . . . The reason is a very obvious one. An execution is the end of the law. To permit money so collected or paid to be reclaimed in a new suit, would lead to indefinite and endless litigation. If such suit could be maintained, then another might be brought to recover the money paid on the judgment and execution in it, and so on *ad infinitum*."—ED.

the defendant's promise to endorse the price of the oxen upon the notes, suffered the defendant to take judgment against him by default, and has been compelled to pay the whole amount of the notes, without any allowance for the price of the oxen.

The defendant pleaded the general issue. The cause was tried here at February term, 1816.

The evidence given on the trial fully proved all the material facts, as stated in the count referred to. A verdict was returned for the plaintiff, which the defendant moved should be set aside, as against law, and a new trial granted.

BELL, J.¹ The plaintiff's declaration, as well as his evidence, shows that the oxen, for the price of which this suit is brought, were delivered by the plaintiff to the defendant in part payment of an existing debt, and not on a contract of sale on a credit.

The evidence in the case would have afforded the plaintiff a good defence, to the extent of fifty-five dollars, in the action brought by the defendant against the plaintiff upon the notes. It could only have availed the plaintiff as a defence as payment, and not as a set off. A set off can only be of an existing debt, for the recovery of which the party pleading might have maintained an action. Had the plaintiff, before the suit brought against him on the note by the defendant, commenced an action against the defendant for the price of the oxen, as on a contract of sale, it cannot be pretended that he could have succeeded.

The evidence in this case would have made a complete defence to such action; it would have shewn conclusively that the oxen passed from the plaintiff to the defendant in part payment of a debt, and not on a contract of sale on a credit. This action cannot be supported on the ground of a sale of the oxen in question, on a credit, as all the evidence shows it was not so; if supported at all, it must be on the ground that the defendant recovered more in the action on the notes than was due to him. On this ground, the plaintiff cannot recover. No legal question is more fully settled and at rest, than that the merits of a judgment recovered in a court of competent jurisdiction, whilst unreversed, is conclusive as to the subject-matter of it, to every intent and purpose, and cannot be re-examined in a new action founded on evidence which would have made a defence to the original suit.

This is to be regarded as a first principle, which cannot now be shaken, even to do what seems to be consistent with justice in a particular case, without endangering the best interest of society. 1 Lord Raymond, 742, and *Mariott v. Hampton*, and 7 T. R. 269; *Philips v. Hunter*, and 2 H. Bl. 413; *White v. Ward & al.*, and 9 John. R. 232;

¹RICHARDSON, C. J., having been of counsel, did not sit in this cause. Reporter.

Heller v. Jones, and 4 Bin. 67; Thatcher & al. v. Gammon, and 12 Mass. Rep. 268.

There would be no termination of suits, if parties who were sued on contracts were permitted to lie by and suffer a judgment by default, and then institute suits to recover back payments made on the contract on which judgment had been so rendered, and which might and ought to have been used as a defence in the original action.

The reasons for adhering to the law on this subject, as settled, are still stronger here than in some of the other states in the Union and in Great Britain, as this court is by statute authorized to grant new trials, even in cases of judgment rendered on default, when it is made to appear that justice has not been done betwixt the parties.

When this circumstance is considered, the seeming hardship of the plaintiff's case disappears.

*Verdict set aside and a new trial granted.*¹

GREENABAUM v. ELLIOTT, ADM'R.

SUPREME COURT OF MISSOURI, 1875.

[60 Missouri, 25.]

ONE Dewey, administrator of Samuel Taylor, brought suit against the plaintiff on a promissory note given by the plaintiff to Samuel Taylor. The plaintiff permitted judgment to be taken against him in that suit by default. This judgment was satisfied. The plaintiff now seeks to recover back the sum so paid, from the defendant, the successor of Dewey, alleging payment to the deceased during his lifetime.²

WAGNER, Judge, delivered the opinion of the court.

But the more conclusive and controlling proposition of law as to the plaintiffs, is, that the matter has become *res judicata*, and they are not at liberty to dispute the verity of the former judgment by

¹This case was expressly overruled in the later case of *Snow v. Prescott* (1842) 12 N. H. 535, but the two cases are clearly distinguishable. 3 Smith's Lead. Cas. (9th Am. Ed.) 1702. A plaintiff, successful in a former suit for a balance due, his first judgment having been satisfied, cannot open up the first judgment on the ground that notes received in payment before the first suit was brought, have since turned out worthless. *Corbet v. Evans* (1855) 25 Pa. St. 310. Nor can a judgment debtor recover back the excess of the sum levied by the sheriff over the amount actually unsatisfied at the time of the execution. *De Medina v. Grove* (1846) 10 Q. B. 152.—Ed.

²A short statement of facts has been substituted for that given in the report.—Ed.

which their liability was solemnly adjudged.¹ When the administrator, Dewey, commenced the action on the note, the plaintiffs appeared in court and filed their joint answer, setting up payment as a defence. They subsequently withdrew that answer, and permitted final judgment to be taken against them. They paid the amount on execution, and they cannot now be allowed to recover it back. If the note was paid to Taylor in his lifetime, that payment constituted a good defence to the action, and should have been taken advantage of at the time, and the failure of the plaintiffs, when they were thus sued and in court, to make the proper defence, conclusively bars them now from averring anything contrary to the record.

This is the recognized, and I might say, at the present time, the universal doctrine. Some of the earlier decisions in Massachusetts announced a different rule, but they cannot be supported, and are not now regarded as authority. In the case of *Rowe v. Smith*, 16 Mass. 306, the plaintiff had paid \$50 on a \$400 note and taken a receipt. Afterwards he was sued on the \$400 note, and judgment was entered against him for the whole amount. An action by the plaintiff to recover back the \$50 was sustained. PARKER, C. J., stated that his first impression was against the recovery, but it was finally sustained on the ground that the defendant had received \$50 which he was not entitled to retain, and that he could not conscientiously be permitted to keep it.

The case of *Loring v. Mansfield*, 17 Mass. 394, involves the same principle decided in *Rowe v. Smith*, with the difference of fact, that in the former case, the plaintiff in the second action appeared in the first and contested the recovery, but did not attempt to prove the payment for which he afterwards brought an action. The court decided, however, that he could not recover; the ground being substantially, that, having been in court, he ought to have proved his whole defence when he had an opportunity.

In neither case was there any actual trial as to the payment claimed to be recovered. This case, therefore, not only impairs the authority of *Rowe v. Smith*, but in fact overrules it.

The case of *Whitecomb v. Williams*, 4 Pick. 228, cited and greatly relied on by plaintiff's counsel, does not in the least aid him. The case went off on different grounds. The court say: "In this case a cause of action has been shown, independent of the judgment; nor was the proof of the judgment at all material to the merits of the case."

"There can be no doubt," says FREEMAN, "that the Massachusetts decisions are in direct conflict with the true rule upon the subject, both English and American, and they were induced by yielding to the hardships of the particular cases in which they were pronounced,

¹Only so much of the opinion is given as relates to this point.—Ed.

and are good illustrations of the maxim, 'that hard cases make bad precedents.' " Freem. Judg. § 286; 2 Sm. Lead. Cas. 667. "It is clear, that if there be a *bona fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation." Duke de Cadaval v. Collins, 4 Ad. & El. 867.

A party having found a receipt for a debt which he had been compelled to pay by judgment, having sought to recover back the money paid, Lord KENYON, before whom the case came, said: "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by process of law there would be no security for any person." Marriott v. Hampton, 7 T. R. 269.

In the recent case of Huffer v. Allen, L. R. 2 Exch. 15, it was declared, that, "it was not competent for either party to an action to aver anything, either expressing or importing a contradiction to the record, which, while it stands, is, as between them, of uncontrollable verity." To the same purport are nearly all the American cases. Tilton v. Gordon, 1 N. H. 33; Broughton v. McIntosh, 1 Ala. 103; Mitchell v. Sanford, 11 Id. 695; Corbet v. Evans, 25 Penn. St. 310; Kirklan v. Brown, 4 Humph. 174; Loomis v. Pulver, 9 Johns. 244; Battey v. Button, 13 Johns. 187.

The case of Walker v. Ames, 2 Cow. 428, was of special hardship. There had been a recovery on an account and also on a note given in settlement of the same account. The defendant in that action then sued to recover back one-half of the judgment thus improperly recovered. The court held that the action would not lie; "that there could be no end to litigation nor any security to a person," if such an action could be brought.

It may therefore be stated as the established rule, that where a defendant has been legally in court, and fails or neglects to make his defence if he has one, the judgment will be conclusive upon him, unless he can show some ground for equitable interference.

The court erred in deciding that the plaintiffs could maintain their action.

In any view that we can take of the case, the judgment is wrong, and it must be reversed. The judgment is reversed; the other judges concur.¹

¹Accord: Stephens v. Howe (1879) 127 Mass. 164. "There are three instances in which a party may overhual a decree: (1) For error in law apparent on its face; (2) upon discovery of new matter, and (3) where the decree was obtained by fraud. Coop. Eq. 45. 96, 98."—Legrand v. Francisco, (1811) 3 Munf. 83, 87. But a judgment may not be attacked collaterally for fraud. Ogle v. Baker (1890) 137 Pa. St. 378.—Ed.

HOSMER v. BARRET, ADM'R OF OLIVER BARRET.

SUPERIOR COURT OF CONNECTICUT, 1794.

[2 Root, 156.]

ACTION of assumpsit, for £24 2s. 5d. lawful money, recovered and paid in April A. D. 1791, to said Oliver in his lifetime on an execution in his favor against the plaintiff. That the plaintiff had since obtained a new trial in said cause, for misleading, and on hearing upon the merits of said cause, recovered judgment in his favor, whereby the defendant became liable to refund said £24 2s. 5d. recovered as aforesaid, and an action had accrued to the plaintiff to recover the same with interest.

Plea in bar, that the new trial was granted for misleading, and in the terms that the future cost only, should follow the final judgment.

Demurrer.—Judgment—Plea insufficient, and for the plaintiff to recover said sum of £24 2s. 5d., and the interest from the time of the final judgment.

CLARK & CLARK v. PINNEY.

SUPREME COURT OF NEW YORK, 1826.

[6 Cowen, 297.]

ASSUMPSIT for money had and received, tried at the Onondaga Circuit, September, 1825, before THROOP, C., Judge.

It appeared by the N. P. record that the suit was commenced as early as February term, 1825. The declaration contained the usual money counts. Plea, *non assumpsit*, with notice of set-off.

On the trial, the plaintiffs' counsel offered in evidence the record of a judgment in the Onondaga Common Pleas of the term of February, 1822, in favor of the defendant against the plaintiffs, for \$193.11; a *fi. fa.* indorsed satisfied by the sheriff, June 21, 1822, except sheriff's fees; that the execution was paid by a note of Walker & Clark, by which they promised the defendant to pay him \$181.24 on the 1st day of February, 1823, with interest, provided the judgment in the Common Pleas should not be reversed before that day. That this was received as and towards payment of the judgment by Pinney and his attorney. The counsel also offered the record of a judgment for \$216.73 in the Onondaga Common Pleas on this note, recovered at May term, 1823, and an execution returnable at the next August term, which had been paid before the return day, and was returned by the sheriff satisfied. They also offered an exemplification of a judgment

record in the Supreme Court in favor of the present plaintiffs against the present defendant, whereby it appeared that the judgment first above mentioned had been reversed on a writ of error, at the October term, 1824. All these facts were admitted by the defendant's counsel, on whose motion the judge nonsuited the plaintiffs, with leave to move to set aside the nonsuit, and for a new trial.

Curia, per SAVAGE, C. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received lies to recover money paid on an execution upon a judgment which was afterwards reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, *ex æquo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is, whether this be the proper remedy.

The cases referred to by counsel do not fully decide the point; nor have I found any case where this very point has been decided except *Green v. Stone*, 1 Har. & John. 405. It was raised in *Isom v. Johns*, 2 Munf. 272. There the defendant had been plaintiff in a former action; recovered judgment, and issued execution, upon which the defendant's property was sold by the sheriff. On the argument, most of the English cases which are now cited were referred to. The court decided against the plaintiff on the ground that the money did not appear to have come to the defendant's use; not denying the doctrine, however, that, if the defendant had received the money, the plaintiff might recover it in this action.

In *Green v. Stone* this very point was decided in favor of the plaintiffs.

The principle in question is supposed to have been acted on in *Feltham v. Terry*, Lofft, 207, which was an action for money had and received by the churchwardens against the overseers of the poor, for money levied by the latter, on a conviction of one of the former, which was subsequently quashed. The court held the plaintiff might sue for the money collected by a sale of the property; or, by bringing trespass, he might have recovered the value of the property. This conviction, I apprehend, must have been irregular; otherwise the court would not have said trespass might have been brought. Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous. In that case, therefore, the court must have acted on the principle that the money was collected by a void authority. The authorities are clear and abundant that, in such a case, *indebitatus assumpsit* lies. 1 Bac. Abr. 261; *Newdigate v. Davy*, 1 Ld. Raym. 742.

In the case of *Mead v. Death & Pollard*, 1 Ld. Raym. 742, it was decided that money paid upon an order of the Quarter Sessions could

not be recovered back, though the order had been quashed on *certiorari*. And TRACY, Baron, before whom the cause was tried, compared it to the case where money is paid upon a judgment which is afterwards reversed for error, in which case *indebitatus assumpsit* will not lie. No reason is given why this action will not lie; nor is any case referred to in support of the *dictum*. It is shown, however, that in the English courts the proper remedy, upon the reversal of a judgment, is a *scire facias quare restitutionem non*, upon which the party recovers all that he has lost by reason of the judgment. Com. Dig. (3 B. 20) Cro. Car. 699. And if it appear on the record that the money is paid, restitution will be awarded without a *scire facias*. 2 Salk. 588.

Cases have been cited in which it is said that this action does not lie to recover money collected under legal process afterwards vacated, which is true as applied to those cases; but the principle is not applicable in this case.

Upon the whole, my view of the question is this: the general principle is, undoubtedly, in favor of sustaining the action. *Isom v. Johns*, decided by the court of appeals of Virginia, is a plain recognition of the principle as governing this very case; and *Green v. Stone* is an authority in point. These are opposed only by a *nisi prius* decision, at a time when the action for money had and received had not come into general use. I am inclined to sustain the action. The inclination of courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money, though it was taken from him by process erroneous merely. Then, why turn him round from this simple action to the antiquated remedy by *scire facias*? I do not think the purposes of justice require it.

It is also contended that the facts in this case do not amount to a payment of money to the defendant. A note was received by the sheriff as payment of the execution, by the direction of the plaintiff and his attorney. And the execution was returned satisfied. Nay, more; a judgment has been obtained; and the money actually paid upon that note. To what would the plaintiffs be restored on a *sci. fa.*? To the money paid by the note, as money. Restitution could be of nothing else. The difficulty in *Isom v. Johns* was that the sheriff could not be held the plaintiff's agent. The facts show him to be so in this case.

In my opinion there should be a new trial.

*New trial granted.*¹

¹Accord: *Raun v. Reynolds* (1861) 18 Cal. 275; *Paulling v. Watson* (1855) 26 Ala. 205; *Ewing v. Peek*, *ib.* 413; *Williams v. Simmons* (1853) 22 Ala. 425; *Dupuy v. Roebuck* (1845) 7 Ala. 484; but the first judgment must be reversed or modified. *Deseret National Bank v. Nuckolls* (1890) 30 Neb. 754. The action is maintainable, although upon reversal of the judgment the cause is remanded and is still pending in the primary court. *Lazell v.*

CAREY v. PRENTICE.

SUPERIOR COURT OF CONNECTICUT, 1784.

[1 *Root*, 91.]

ACTION of indebitatus assumpsit for money had and received for the plaintiff's use. Plea non assumpsit. Issue to the jury.

The case was—In December A. D. 1780 the defendant was commandant of the Fort at New London: and the plaintiff was going out with his vessel, loaded with oats; having the governor's permit to transport them to Newport, but had not given bond agreeable to the statute; the defendant seized the vessel and cargo: upon which the plaintiff gave the defendant £145, to let him pass; which the defendant received and permitted the plaintiff to pass without giving bonds. Verdict and judgment was for the plaintiff to recover, being money paid upon an illegal consideration, and which the defendant had no right to hold or retain.¹

Miller (1818) 15 Mass. 207; *Sturges v. Allis* (1833) 10 Wend. 354. And so, of course, where a former judgment has been reversed, and upon a new trial judgment has been entered for the defendant. *Traveller's Ins. Co. v. Heath* (1880) 95 Pa. St. 333; *Hamilton v. Aslin* (1834) 3 Watts, 222, though money voluntarily paid on a void judgment subsequently reversed cannot be recovered. *Gould v. McFall* (1888) 118 Pa. St. 455, S. C. 4 Am. St. Reps. 606 and note.

Where the record defendant was only a nominal party, and the real defendant had paid the judgment, it was held an action would lie by the latter to recover the money so paid, the first judgment having been reversed. *Stevens v. Fitch* (1846) 11 Met. 248; *Dennett v. Nevers* (1831) 7 Greenl. 399. The action also lies against the real plaintiff in the action although a nominal plaintiff prosecuted the suit. *Maghee v. Kellogg* (1840) 24 Wend. 32. Indeed, it has been said under similar conditions that an action at law can be sustained by him only in whom the legal interest in the subject matter of the suit is vested. *Sanford v. Nichols* (1841) 14 Conn. 324. See also *Garr v. Martin* (1859) 20 N. Y. 306.

"On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*; when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary, to ascertain what is to be restored. 2 Salk. 587, 588; Tidd's Pract. 936, 1137, 1138. And, no doubt, circumstances may exist, where an action may be sustained to recover back the money. 6 Cow. 297. But as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding. A contrary doctrine would be extremely incon-

¹Cf. *Edmonson v. Popkin* (1798) 1 B. & P. 270.—Ed.

RICHARDSON v. DUNCAN.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1826.

[3 *New Hampshire*, 508.]

ASSUMPSIT for \$62.50, money had and received by the defendant for the use of the plaintiff.

The cause came on for trial here, upon the general issue at May term 1826, when the plaintiff's counsel stated his case to be as follows: On the 8th of April, 1825, the defendant made a complaint to a justice of the peace against the plaintiff, and his son, *Joseph Richardson*, charging them with tearing down and burning a house and barn; and on the same day a warrant was issued, by the justice, against the said *Nathan* and *Joseph*, and was delivered to a deputy sheriff by the defendant, who employed two persons to attend the deputy, and aid him in securing the prisoners. That the said *Joseph* and *Nathan* were arrested immediately, and carried before the said justice for examination. They requested time to send for counsel; but the defendant refused to have the examination delayed for that purpose. The examination proceeded, and the evidence was, that the plaintiff and his son, quietly and peaceably, openly and publicly, took down an old house and barn, which stood on the plaintiff's land: and that all the timber and boards of any value were carefully piled up; and that some refuse boards and shingles were burned. The justice ordered the plaintiff and his son to recognize for their appearance at the next superior court, in the sum of \$500, each, with sureties. During the examination, and afterwards, the defendant, and others, represented, that the said *Nathan* and *Joseph* would have to go to the state's prison; and this impression was created to such a degree, that they found it impossible to procure sureties for their appearance at the superior court. While the justice was making out a mittimus, the defendant told the plaintiff and his son, that they had better settle the matter, and offered to drop the prosecution for \$125; and to this they, unable to procure sureties, assented. Whereupon the plaintiff turned out goods of the value of \$62.50, which the defendant received in payment, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterward done, should the judgment, at any future day, be reversed, it would, virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties; the writ of error may be so taken out as to operate as a *supersedeas*; or, if a proper case can be made for the interference of a court of chancery, the execution may be stayed by injunction." *Bank of U. S. v. Bank of Washington* (1832) 6 Peters, 8, 17.—Ed.

ment of that sum; and the prosecution was dropped, and no further proceedings had. After this, the defendant declared, that he did not know, that the prosecution could have been maintained; but he meant to get as much out of them, as the house was worth, and that was all he cared for. The defendant sold the goods he received before the commencement of this action.

The court, under an impression, that this action could not be maintained upon these facts, directed a nonsuit, subject to the opinion of the court, upon the case above stated.

H. Hubbard, for the defendant.

J. Parker, for the plaintiff. The defendant has received the property of the plaintiff, and converted that property into money. It was obtained without any consideration, by fraud, extortion, and duress. An action for money had and received will lie to recover money obtained from any one by extortion, imposition, or oppression. *Bates v. N. Y. Insurance Company*, 1 Johnson's cases, 240; *Astley v. Reynolds*, 2 Strange, 915; *Williams v. Hedley*, 8 East, 378; *Irving v. Wilson*, 4 D. & E. 485; *Clinton v. Strong*, 9 Johns. 370; *Ripley v. Gelston*, *ib.* 201; *Snowdon v. Davis*, 1 Taunt. 359; *Moses v. Macferlan*, 2 Burrow, 1005; *Smith v. Broomlay*, Doug. 696, note; *Wheaton v. Hibbard*, 20 Johns. 293; *Lovell v. Simpson*, 3 Esp. N. P. C. 153; *Frye v. Lockwood*, 4 Cowen, 454; *Watkins v. Baird*, 6 Mass. Rep. 506; *Collins v. Westbury*, 2 Bay's Rep. 211; Bac. Ab. "Duress," A.; 2 Starkie's Evidence, 505.

It is not necessary, in order to maintain this action, to shew, that the defendant has received money. It is sufficient to shew, that he has received an equivalent for money, or money's worth—it is sufficient, that he has received something, which has represented money, and done the office of money. *Willie v. Green*, 2 N. H. Rep. 335; *Danforth v. Dewey*, 3 N. H. Rep. 79; *Hemmenway v. Bradford*, 14 Mass. Rep. 121; *Randall v. Rich*, 11 Mass. Rep. 494.

But, in this case, the goods having been converted into money, by the defendant, the proceeds would be money in his hands, so as to sustain this action, if there was any doubt on the other point. *Chauncey v. Yeaton*, 1 N. H. Rep. 154; 1 Chitt. Pl. 90; *Webber v. Aldrich*, 2 N. H. Rep. 462; *Foster v. Stewart*, 3 M. & S. 198; *Lamine v. Dorrell*, 2 L. Raymond, 1216; 2 Comyn on Con. 18; *King v. Leith*, 2 D. & E. 141; *Harrison v. Walker*, Peake's cases, 111; *Abbots v. Barry*, 2 Brod. & Bing. 369.

The parties, in this case, are not in *pari delicto*, so that the money is to be left in the hands of the defendant, on that ground, he having, by means of a groundless prosecution, taken undue advantage of the ignorance and fears of the plaintiff. There can be no compounding of a felony, when none has been committed. *Clark v. Shee*, Cowp. 197; *Smith v. Bromley*, Doug. 697; *Wheaton v. Hibbard*, 20 Johns. 293.

All the authorities agree, that, when a party is overreached, defrauded, or oppressed, or where an undue advantage is taken of his situation, he is not to be considered in *pari delicto*; and the rule of *potior est conditio possidentis* is not to be applied. He is in such a case to be viewed rather as the victim of the other party, than as a *particeps criminis*.

The evidence offered in this case, exhibits a gross perversion of the criminal process of the state, which, we think, calls loudly for remedy. And this action is, in our belief, well adapted to give proper relief. If the defendant has money, which *ex æquo et bono* the plaintiff is entitled to recover, we trust, that the court will not turn us round, to another action, after we have expended double the amount of the sum claimed, unless it be absolutely necessary.

RICHARDSON, C. J., delivered the opinion of the court.

We had an impression, when this case was opened, upon the trial before the jury, that, the plaintiff being in custody by virtue of a warrant in due form of law, the contract, he made with the defendant, could not be considered as made by duress, so as to render it void; and on this ground a nonsuit was directed. But, upon an attentive examination of the authorities cited by the plaintiff's counsel, we are now convinced, that our impressions were erroneous, and that the case of the plaintiff ought to have been submitted to the jury.

The only case, which we have found to justify a nonsuit, under the circumstances of this cause, is the one in 1 Lev. 68, which was an *auditiā quērēlā* on a release given after judgment; and the question was, whether the release was made by duress? The evidence was, that the defendant, not having good cause of action, caused the plaintiff to be arrested, and detained in prison, till he made the release, with menaces, that he should lie in prison and rot, if he would not seal a release; and BRIDGMAN, C. J., held, that he being in custody of the law, by the King's writ, it was not any duress, to be pleaded in avoidance of the deed. But he offered to have it found specially; if the plaintiff's counsel requested it; but he did not request it.

But it is now well settled, that when there is an arrest for improper purposes, without a just cause; or where there is an arrest for a just cause; but without lawful authority; or where there is an arrest for a just cause, and under lawful authority, for unlawful purposes, it may be construed a duress. Buller's N. P. 172; Watkins v. Baird, 6 Mass. Rep. 506; Com. Dig. "Pleader," 2 W. 19; 1 Rolle's Ab. 687.

We are therefore of opinion, that the nonsuit in this case must be set aside, and the cause stand for trial.¹

¹Accord: Duke de Cadaval v. Collins (1836) 4 Ad. & E. 858.

A threat that an arrest would be made unless a certain license was paid, the ordinance assessing it being afterwards declared void, was held not to constitute duress. Bollinger v. Gettysburg Borough (1889) 6 Pa. Co. Rep.

CHANDLER v. SANGER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1874.

[114 *Massachusetts*, 364.]SEE *ante*, p. 182 for a report of the case.

PRESTON v. THE CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1831.

[12 *Pickering*, '7.]

ASSUMPSIT to recover \$711.50, money had and received to the use of the plaintiff, being the amount of a tax assessed upon him for the year 1828, for his poll and personal estate, and by him paid to the treasurer and collector of the city of Boston.

At the trial, before WILDE, J., it was proved that the plaintiff, with his wife, had lived at board in Medford several years, and had been taxed there four years preceding 1828, and also that year, and that on the 1st of May, 1828, one of the assessors of Medford saw him there, at the house of his son-in-law, with whom he and his wife were then boarders. The plaintiff was usually in Boston some days every three or four weeks, where his principal business was the taking care of his property, consisting chiefly of public stocks and money, and on those occasions he boarded with a son-in-law who resided there; and the early part of the month of May, 1828, the plaintiff passed in Boston.

It was not questioned on the part of the defendants that the plaintiff had his residence in Medford and was liable to be taxed there in the year 1828. The defence set up was, that he had requested the assessors of Boston to tax him there by the following note addressed to them. "Boston, Gough Street, May, 1828. You will please to be informed that I am a boarder at my son's, E. D. Clarke, and you are requested to assess me this year a light tax for personal estate; trusting in your prudence and moderation, it is my wish in future to pay a light tax to this city."

369; nor does a threat to make a lawful arrest unless money properly due is paid. *Eddy v. Herrin* (1840) 17 Me. 338.

Money paid to obtain a release from an arrest made by lawful authority, for a just cause, but for an improper purpose, may be recovered. *Severance v. Kimball* (1836) 8 N. H. 386.—Ed.

The plaintiff was the owner of real estate in Boston, for which he admitted that he was regularly taxed in 1828. The taxes of that year were committed to Mackay, the treasurer and collector, on the 1st of November, and he soon gave notice to the plaintiff of his being taxed in Boston, and of the amount of his tax, with the time when payment would be required. On the 20th of December, 1828, the plaintiff called upon Mackay, paid the tax on his real estate, and then objected to the tax on his poll and personal estate as being an illegal assessment, saying that he was taxed wrongfully, that he had been taxed in Medford for his poll and personal estate for 1828, and had already paid his taxes there. Mackay replied that if he did not pay at the time limited, a warrant of distress must be issued against him, unless he obtained an abatement. The plaintiff thereupon petitioned the mayor and aldermen of the city for an abatement of his tax, which being refused, he paid the amount to Mackay on the 17th of January, 1829.

Upon these facts such judgment was to be rendered, upon nonsuit or default, as the whole court should direct.

SHAW, C. J., delivered the opinion of the court.

The only remaining question is, whether this money was paid voluntarily or under duress.¹ A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course would put it in the power of the other party to choose his own time and opportunity for commencing a suit. *Brisbane v. Dacres*, 5 Taunt. 143. But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. *Astley v. Reynolds*, 2 Str. 916.

What shall constitute such duress, is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. *Knibbs v. Hall*, 1 Esp. 84. Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. *Brown v. M'Kinnally*, 1 Esp. 279. But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he

¹Only so much of the opinion is given as relates to this question.—Ed.

may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable to recover it back as money had and received. *Amesbury W. & C. Manuf. Co. v. Amesbury*, 17 Mass. 461.

It appears by the facts agreed that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing that he was not liable he may recover it back in this action from the defendants, into whose treasury it has gone.

*Defendants defaulted.*¹

¹Accord: *Atwell v. Zeluff* (1872) 26 Mich. 118; *Parcher v. Marathon Co.* (1881) 52 Wis. 388. For subsequent interpretations of the principal case, see *Dorr v. Boston* (1856) 6 Gray, 131; *Lincoln v. Worcester* (1851) 8 Cush. 55, 62; *Bates v. Boston* (1849) 5 Cush. 93, 97; *Harrington v. Glidden* (1901) 179 Mass. 486, 494.

A judgment debtor paying after judgment entered or adjudication made, but before execution, pays under duress. *Seholey v. Halsey* (1878) 72 N. Y. 578.

"When, however, the payment is made in obedience to the judgment of a court which had determined that he must pay it, and that his adversary had the right to demand it of him, and subsequently a legal tribunal of competent authority adjudges that the first judgment was erroneous, and therefore vacates and reverses it, the conclusion is irresistible that the plaintiff in the first judgment, if he has received its amount, has received what he is equitably and justly bound to restore." *Lott v. Swezey* (1859) 29 Barb. 87.

A threat of a judgment creditor, to obtain satisfaction by a levy on the property of the judgment debtor, is not voidable duress. *Wileox v. Howland* (1839) 23 Pick. 167.—Ed.

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MAYOR, ETC., OF BALTIMORE *v.* LEFFERMAN.

COURT OF APPEALS OF MARYLAND, 1846.

[4 *Gill's Maryland Reports*, 425.]APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought to May term 1844, by the appellee against the appellant; to recover a sum paid, laid out and expended by him, to and for the defendant, &c. The defendants pleaded *non assumpsit*, and the verdict was for the plaintiff.

The legislature of Maryland by an act of Feb. 23, 1882, authorized the city of Baltimore to compel parties owning property binding on Jones Falls, to wall up such property "in such manner as the corporation may by ordinance direct." By ordinance the mayor and city council of Baltimore directed the city commissioners to notify the property owners to build such walls and provided that in case such walls were not built as directed, the commissioner might contract and have the same built, and then levy on the property for the expense as for a tax. The appellee being notified to build the wall and of the terms of the ordinance, constructed the wall and then brought *assumpsit* against the city to recover the money so expended. He alleged, first, that the legislative act authorizing the improvement was unconstitutional; secondly, that his expenditure in the matter was involuntary.¹

MARTIN, J., delivered the opinion of the court.²

Upon the question raised by the plaintiff's *first* prayer, that which respects the validity of the first section of the act of Assembly of 1821, chap. 252, this court is equally divided in opinion. The opinion of the county court pronouncing this statute to be unconstitutional and void, stands affirmed; and the requisition imposed upon the appellee, to construct a wall on his property binding on the *Falls*, by the ordinance to which we have adverted, must be regarded as unauthorized and illegal.

This presents for our examination, the proposition embodied in the plaintiff's *second* prayer:—That assuming that the expenditure in question, was made by the plaintiff in consequence of the notices exhibited in evidence, and in obedience to the ordinance under which such notices were given,—an ordinance passed in the exercise of a power, not lawfully delegated to the defendants:—that an expenditure made under such circumstances, is to be considered as compulsory in its character, and entitled the appellee to reclaim from the appellants, the money expended for their use and benefit.

¹A short statement of facts is substituted for that given in the report.—Ed.²A part only of the opinion is given.—Ed.

It is now established, by an unbroken series of adjudications in the *English* and *American* courts, that where money is voluntarily and fairly paid, with a full knowledge of the facts and circumstances under which it is demanded, it cannot be recovered back in a court of law, upon the ground, that the payment was made under a misapprehension of the legal rights and obligations of the party.

In the case of *Brisbane v. Dacres*, 5 Taunt. 151, GIBBS, Justice, when examining this subject, says:—

“We must take this payment to have been made under a demand of right, and I think, that where a man demands money of another, as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he can never recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise; there are many doubtful questions of law: when they arise, the party has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money, gives it to the person to whom he pays it, and makes it his, and closes the transaction between them.”

The opinion and reasoning of GIBBS, Justice, in this case, is cited, with approbation, in *Elliott v. Swartwont*, 10 Pet. 154, as containing a correct exposition of the law on this question; and the *Supreme Court* held:—

“That in case of a voluntary payment, by mere mistake of law, no action will lie to recover back the money. The construction of law is open to both parties, and each is presumed to know it.” The same doctrine is announced in *Clarke v. Dutcher*, 9 Cow. 674, and *Mowatt v. Wright*, 1 Wend. 355, and is too firmly settled to be questioned or disputed.

As it is evident, that the expenditure was made in this case by the plaintiff, with a full knowledge of all the facts accompanying the transaction, and in obedience to a demand, fairly, although illegally made, by the defendants; the mere circumstance, that he was at the time ignorant of his legal rights, does not authorize a reclamation of the money expended; and the counsel for the plaintiff has placed his right to recover, on the ground, that from the circumstances of the case, the jury were warranted in finding, that he had expended the money, not voluntarily, but under the compulsion of the defendants, in their exercise of an unauthorized power.

It is not pretended, that the defendants are justly chargeable with having procured this expenditure, through the instrumentality of fraud or imposition.

Or that the defendants took an undue advantage of the situation

of the plaintiff, for the purpose of extorting from him the performance of this work.

As in *Pigot's* case, cited by Lord KENYON, in *Cartwright v. Rowley*, 2 Esp. 723, where an action was brought to recover back money paid to a steward of a manor, for producing at a trial some deeds and court rolls, and for which he had charged extravagantly. And the objection being taken, that the money had been voluntarily paid, it was held, that the money being paid through necessity, and the urgency of the case, was recoverable.

But the right to maintain this action, so far as this branch of the case is concerned, turns on the question, whether, assuming the facts asserted in the prayer to be true, the circumstances under which the expenditure was made, impressed upon it the character of a compulsory payment of money, as that term is legally understood and applied.

Upon this branch of the law, numerous cases are to be found, but it is proposed to refer only to a few of these, of unquestionable authority, and which are most analogous to the one under consideration.

In *Knobbs v. Hall*, 1 Esp. Rep. 84, a case frequently recognized, and in 1840, by Lord DENMAN, in *Skeate v. Beale*, 11 Adol. & El. 983, an action of assumpsit was instituted for the use and occupation of certain rooms in the *City Chambers*. One article of the set-off, which the defendant proposed to give in evidence, was as follows:—

“The defendant being indebted to plaintiff, for other *chambers*, which he then occupied. The plaintiff demanded payment, at the rent of twenty-five guineas per year. The defendant insisted that he had taken them at twenty guineas per year, only, and offered to pay at that rate. The plaintiff refused to take it, and threatened to distrain if not paid at the rate of twenty-five guineas; and the defendant, in order to avoid the distress, paid at that rate; and having proved that the *chambers* were really let at twenty guineas, proposed to set off the overplus, as paid by compulsion: But Lord KENYON held, that this could not be deemed a payment by compulsion, as the defendant *might have, by a replevin*, defended himself against the distress; and that after a voluntary payment, so made, he should not be allowed to dispute its legality.”

In the case of *Fullam v. Down*, 6 Esp. 26, note, Lord KENYON, when considering this subject, announced:—

“That where a voluntary payment was made of an illegal demand, without an immediate and urgent necessity, or to redeem your person or your goods, it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties, to revision.” The opinion appears to be qualified by the remark: “the party knowing the demand to be illegal.” But the character of the payment never depends, as we have

seen, on the knowledge of the party, and if voluntary, it is binding, although made under the impression, that the demand was legal.

The same position is maintained, in *Shaw v. Woodcock*, 7 Bar. & Cres. 73, where it was adjudged: That a payment, made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

And BAYLEY, Justice, in discriminating between a voluntary and compulsory payment, says:—

“If a party has in his possession, goods or property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money, which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back.”

In *Ashmole v. Wainwright*, 2 Adol. and El. N. S. 837, the money was paid for the purpose of delivering the goods of the plaintiff from the possession of the defendants, who detained them, as common carriers. The action to recover back the money paid for their deliverance, was sustained. COLERIDGE, Justice, saying:—“That he never doubted that an action for money had and received might be maintained on a wrongful detainer of goods.”

Irving v. Wilson, 4 Term. 486, was a case in which the property of the plaintiff was actually seized by a revenue officer, as forfeited, when in fact it was not liable to seizure, and money received from the owner to release it. It was a clear case of extortion and duress; and the payment made to obtain the goods could not be considered as voluntary. ASHHURST, Justice, says:—“It was not a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power.”

In *Clinton v. Strong*, Johnson R. 369, the vessel of the plaintiff was seized as having violated the non-intercourse law, but was subsequently withdrawn, as the vessel was found to be innocent. But the marshal refused to re-deliver the vessel, unless the costs were paid. The costs were paid by the plaintiff, as the only means of obtaining a restoration of his property. The court considered the property in duress; and held that the payment of the costs was not voluntary, as they were exacted by the officer as a condition of the re-delivery of the vessel.

In the case of *Chase v. Dwinal*, 7 Greenl. Rep. 134, the money sought to be recovered back by the plaintiff, had been paid to liberate a raft of lumber, detained by the defendant, in order to exact an illegal toll; and it was determined, that money paid under such circumstances, was a payment under duress, and necessity, and therefore by compulsion. The court, alluding to the maxim, “*volenti, non fit injuria.*” say:—

"But this rule applies where the party has a freedom in the exercise of his will; and is under no such duress or necessity, as may give his payments the character of having been made upon compulsion." And again,

"If money is voluntarily paid to close a transaction, without duress, either of the person or goods, the legal maxim, '*volenti non fit injuria*' may be allowed to operate. But it would be a perversion of the maxim, to apply it for the benefit of a party, who had added extortion, to unjustifiable force and violence."

In the case of the Boston & Sandwich Glass Co. v. The City of Boston, 4 Medf. 181, the tax was levied on the personal property of the plaintiffs, by the collector, for the collection of taxes, alleged to be due from him. With this levy placed upon their property, the plaintiffs paid the taxes, under a protest, that they were illegal, and were paid under duress, and not voluntarily. The taxes were assessed without authority, and plaintiffs recovered the amount in an action of assumpsit.

In this case the tax was actually levied on the property, and if the assessment had remained unpaid, a sale would have followed. The court in stating the ground on which a payment of this description is regarded as compulsory, refer to Preston v. City of Boston, 12 Pick. 7, and say:—

"It arises from the power and authority placed in the hands of a collector of taxes, to levy directly upon the property or person of every individual, whose name is borne on the tax lists, in default of payment of the taxes. To use the language of the court, in the case just referred to, such warrant is in the nature of an execution running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability."

The court refer to the cases of Shaw v. Woodcock, 7 Bar. and Cres. 73; Astley v. Reynolds, 2 Strange, 916; and Chase v. Dwinal, 7 Greenl. R. 134, and it is evident from the whole tenor of the opinion, that they considered a payment compulsory, only when it was made for the purpose of liberating the person or property, from the duress of a party who has control of it.

We consider, therefore, the doctrine as established, that a payment is not to be regarded as compulsory, unless made to emancipate the person or property, from an actual and existing duress, imposed upon it by the party, to whom the money is paid. And that a payment made under the apprehension, or even menace of an impending distress warrant, would not render it a payment by compulsion. Knobbs v. Hall, 1 Esp. Rep. 84. Colwell v. Peden, 3 Watts, 328.

Testing the case before us by this principle, it is manifest, that the expenditure made by the plaintiff has none of the characteristics of a payment by compulsion: It is the clear case of an act performed

by the plaintiff, in obedience to the demand of the defendants, conscientiously and honestly preferred; which the plaintiff regarded at the time as lawful and just, but in which, it appears from subsequent events, that he was mistaken. It is the plain case, of an expenditure voluntarily and freely made by the appellee, in the belief that he was performing his duty, but under a misapprehension of his legal responsibility.

It cannot be pretended, that any duress or force was applied to the property or person of the plaintiff, as a means of coercing the execution of this work, or that the money was expended to extricate his estate from the pressure of some process that could not be resisted.

The appellee was warned by the notice of the 19th of June 1839, that if the wall was not commenced within three months, the city commissioners would have it done, and charged to his account, as directed by one of the ordinances. That is, that the appellants would direct the wall to be constructed by others, and collect such expenses as might be incurred, by suit, or distress, in the manner in which paving taxes are collected. But this is no duress or coercion; and all that can be urged in vindication of the position assumed by the appellee is, that the expenditure was made by him, under the apprehension, that if the wall was not erected, the improvement would be executed by the appellants, and the cost charged to his account, and recovered by suit, or warrant. A payment made under said circumstances, is in law, not regarded, as compulsory in its character. If a distress warrant had been laid by the collector of the appellants, on the property of the appellee, and he had made the expenditure for the purpose of liberating his property from the predicament in which it was thus placed, the aspect of the question would have been changed, and such a payment might be treated, as by compulsion. But there is no such feature in this case, and the court erred, we think, in granting the plaintiff's second prayer.

It follows from the views thus expressed, that this court is divided in opinion, on the question raised by the defendant's first prayer: and that we think, the court below erred in rejecting their second prayer.

The judgment of the county court is therefore reversed without a *procedendo*.

JUDGMENT REVERSED.¹

¹Followed in *Morris v. Mayor* (1847) 5 Gill, 244. For other elaborate discussions of the questions involved in the principal case, see *Mays v. Cincinnati* (1853) 1 Ohio St. 268, 274; *Marietta v. Sloan* (1856) 6 Ohio St. 471; *Brumagin v. Tillinghast* (1861) 18 Cal. 265; *Stephan v. Daniels* (1875) 27 Ohio St. 527; *Elston v. Chicago* (1866) 40 Ill. 514; *Baker v. City of Cincinnati* (1860) 11 Ohio St. 534.

"There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of these goods again, without any agreement

Benson v. Monroe (1851) 7 Cush. 125, 126. METCALF, J., delivered the opinion of the court. It is an established rule of law, that if a party, with full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, although there is some case in Viner's Abridgement to the contrary (Vin. Abr. Duress, B. 3; 1 Roll. Abr. 687), that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and that it is so laid down in Sheppard's Touchstone (p. 61): But the ground is that it is not a voluntary payment. If my goods have been wrongfully detained and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."—Per PARKE, B., in *Atlee v. Backhouse* (1838) 3 M. & W. 633, 650. Acc. *Skeate v. Beale* (1841) 11 Ad. & E. 983. As to distinction between duress of real and personal property, see *Fleetwood v. New York* (1849) 2 Sandf. 475.

Money paid to secure a license under an ordinance afterwards declared unconstitutional, payment being made under a mere apprehension of legal proceedings, cannot be recovered back. *Town of Ligonier v. Ackerman* (1874) 46 Ind. 552; *Town Council of Cahaba v. Burnett* (1859) 34 Ala. 400; *Cook v. Boston* (1864) 9 Allen, 393; nor can it if the license is issued at the request of the plaintiff, without objection or protest. *Mays v. Cincinnati* (1853) 1 Ohio St. 268. But where county commissioners granted a license to one making the largest donation to the county, such act being in excess of their powers, it was held such money might be recovered with interest. *County of La Salle v. Simmons* (1849) 10 Ill. (5 Gilm.) 513. And money paid under an unconstitutional ordinance, by reason of "threats of prosecution, or under a belief, induced by the officers of the town, that only by payment could they escape prosecution, and was paid by them under protest, then such payment can in no just sense be called voluntary, and so is recoverable." *Harvey v. Town of Olney* (1866) 42 Ill. 336. See *Smith v. Hutchinson* (1855) 8 Rich. 260.

Questions as to voluntary payments arise most frequently in connection with cases brought to recover money paid for illegal taxes. If an illegal tax is voluntarily paid, it cannot be recovered. *Smith v. Schroeder* (1870) 15 Minn. 18; *Jenks v. Lima Township* (1861) 17 Ind. 328; though if the assessment is valid on its face, but really void, a recovery may be had. *Bruecher v. Port Chester* (1886) 101 N. Y. 240. But see *Jenks v. Lima Township*, *supra*; *Fleetwood v. New York* (1849) 2 Sandf. 475. It is said that payment can be considered voluntary only "when it is made to produce the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it." *Mays v. Cincinnati* (1853) 1 Ohio St. 268, 278; *Jenks v. Lima Township* (1861) 17 Ind. 328, in which case it would seem unnecessary to protest. *Lincoln v. City of Worcester* (1851) 8 Cush.

unless there be a fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party, so paying, protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law.

55, 61. But the mere possession by the collectors of warrants of attachment is not sufficient. *Smith v. Readfield* (1847) 27 Me. 145; but see *Joyner v. Third School District* (1849) 3 Cush. 567. Payments, under threats, express or implied, that legal remedies for the tax will be resorted to, is voluntary. *Taylor v. Board of Health* (1855) 31 Pa. St. 73; even though a protest is made at the time of payment, *Lester v. Baltimore* (1868) 29 Md. 415, unless if the threatened sale were made it would be a cloud on the title. *City of Detroit v. Martin* (1876) 34 Mich. 170 (but where the illegality appears on the face of the proceedings, no cloud is cast. *Curtis v. East Saginaw* (1877) 35 Mich. 508); *Swanston v. Ijams* (1872) 63 Ill. 165. But it is held in New York that a sale under a void assessment casts no cloud on the title, distinguishing duress as to personality and reality. *Fleetwood v. New York* (1849) 2 Sandf. 475, and see *Tripler v. Mayor* (1891) 125 N. Y. 617. So a payment was held voluntary that was made to redeem tax sale certificates, issued against property in a sale for an illegal tax, the owner at the time of payment expressly denying the validity of the tax, and paying to prevent the issuance of tax deeds. *Phillips v. Jefferson Co.* (1870) 5 Kan. 412; *Powell v. Board* (1879) 46 Wis. 210; but see *Vaughn v. Village of Port Chester* (1892) 135 N. Y. 460. Where goods were distrained for a tax partly legal and partly illegal, the whole sum realized from the sale was recovered. *Drew v. Davis* (1838) 10 Vt. 506, but see *Hemmingway v. Machias* (1851) 33 Me. 445; and so, of course, a recovery was permitted when the tax was wholly void. *Sumner v. First Parish* (1826) 4 Pick. 361. Where no goods were distrained, but a tax partly legal, partly illegal was paid, a recovery was not permitted, no protest having been made. *Borough of Allentown v. Saeger* (1853) 20 Pa. St. 421. The courts are at variance upon the general doctrine, but they seem uniformly unwilling to permit a recovery of money paid on illegally assessed real property taxes, owing probably to the attempted distinction between real and personal property, *Fleetwood v. New York*, *supra*, which distinction is based on the idea that as real property is non-attachable and cannot be passed from hand to hand, an owner is able at all times to test the validity of a tax. However, a very respectable authority has said that on principle and authority there is and can be no distinction between real and personal property. *Joannin v. Oglivie* (1892) 49 Minn. 564, and authorities cited. (See *ante*, p. 184, where the case is printed.)

An executor paying out funds by a decree of a court, pays under compulsion, and is not liable for such payment, though the decree is subsequently reversed. *Farrell v. Smith* (1813) 2 Ba. & Be. 337; *Bennett v. Hamill* (1806) 2 Sch. & Lef. 566, 578.

In an appeal from the Court of Claims, it was held that if a collector of customs, pursuant to a peremptory order of the Commissioner of Customs, pays into the treasury money to which he is lawfully entitled as part of the fees and emoluments of his office, he may recover the same. *U. S. v. Ellsworth* (1879) 101 U. S. 171; citing and approving *U. S. v. Lawson*, *id.* 164.—Ed.

He has or may have a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay. . . . As was said by GIBBS, J., in *Brisbane v. Dacres*, 5 Taunt. 152, the party has an option, whether to litigate the question, or submit to the demand and pay the money. See also *Preston v. City of Boston*, 12 Pick. 13, 14; *Rawson v. Porter*, 9 Greenl. 119.¹

ATWELL v. ZELUFF.

SUPREME COURT OF MICHIGAN, 1872.

[26 *Michigan*, 118.]

CAMPBELL, J. Atwell sued Zeluff, who was supervisor of the town of Ridgeway. Lenawee county, in an action of trespass, the cause of action being the issue by Zeluff of tax rolls for the collection of ditch taxes against Atwell, one of which he paid on demand of the collector, and the other was enforced by selling his personal property. The warrant issued to the collector, was the one required by law for the regular annual taxes, to be enforced, in case of non-payment, by sale of chattels. The ditch tax was extended on the general tax roll.

In regard to the payment made without levy on his goods, it was objected that the payment being without protest, was voluntary.² The question was somewhat discussed, but not actually decided, in the case of the *First National Bank of Sturgis v. Watkins*, 21 Mich. R. 483. Where an officer demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it, may fairly assume that if he seeks to act under the process at all, he will make it effectual. The demand itself is equivalent to a service of the writ

"So if a party can have his day in court before payment, and does not avail himself of it, he cannot be allowed, after permitting that opportunity to pass by, to maintain an action to recover back.

"In such cases, the maxim '*Interest rei publicæ ut sit finis litium*' governs. *Mariott v. Hampton*, 7 Term Rep. 269; *Brown v. McKinnally*, 1 Esp. 279; *Hamlet v. Richardson*, 9 Bing. 644; *Dew v. Parsons*, 2 B. & Al. 562, 2 Smith's Lead. Cas. marginal, p. 402; *Covington Bridge Co. v. Sargent*, 27 Ohio St. 233."—*Stephan v. Daniels* (1875) 27 Ohio St. 527, 539. *Acc. Marietta v. Slocumb* (1856) 6 Ohio St. 471.

"To make it a case of payment under compulsion [as to realty], there must be an illegal demand, coupled with a present power or authority in the person making such demand, to sell or dispose of the property, if payment is not made as demanded."—*Mariposa Co. v. Bowman* (1867) Deady, 228, 231; *Smith v. Readfield* (1847) 27 Me. 145, 147; *Boston, &c. v. Boston* (1842) 4 Met. 181; *Mays v. Cincinnati* (1853) 1 Ohio St. 268, 278.—Ed

²Only so much of the opinion as bears upon this point is given.—Ed.

on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after once making demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion.

There has been some confusion among the authorities as to the necessity or effect of a protest in such cases, but the question has not often arisen upon the service of legal process. In some cases it has been intimated that it might be necessary, in order to recover back a payment from the person to whom it was actually paid, after he had paid over the money under his agency. But where the person demanding and receiving the money, does so under color of process, as a legal officer, we think the payment must be deemed involuntary, because the party paying has no legal means, by appeal or otherwise, of preventing the seizure of his property. If he has such means of redress, which would be effectual to stay the process, there is reason for making a distinction which may, perhaps, be sustained. The supreme court of Massachusetts, in *Boston & Sandwich Glass Co. v. City of Boston*, 4 Met. 181, citing a former case in 17 Mass. 461, refer to the absolute character of the warrant as excusing the necessity of a protest. But we think the rule of damages there adopted as to the difference of liability where there is and where there is not a protest, is also based on good sense. Where the money is not paid under protest, it is there held that no interest should be allowed until demand or action brought, so as to put the party sued in actual fault for not making satisfaction as soon as the wrong is pressed upon his notice. A payment without protest may prevent him from making inquiry and examining into the law, and while legal ignorance will not excuse an illegal demand, it may very properly qualify the extent of damages for a merely technical wrong.

As this defect is fatal,¹ and there can be no jurisdiction under the roll, no other questions need be discussed. There was no demand here before suit brought, and the sale is not shown to have been any fixed time before. Judgment must be reversed, and a new judgment must be entered for plaintiff, on the finding, for the amount of the illegal exactions, with interest from suit brought, and with costs of all the courts.

There are such practical hardships in permitting persons to be held liable to action, where no distinct protest is made, pointing out reasons why a collector should withhold action under his warrant, that it is a proper subject for legislative consideration, whether some provision

¹The tax rolls were declared void for uncertainty, and so the tax levied according to them was void.—Ed.

should not be made to regulate the matter. The officers can seldom be expected to understand the niceties of the law, and it is not desirable that persons should be deterred from holding the necessary local offices, by fear of consequences for which they are not morally responsible.

The other justices concurred.¹

FELLOWS *v.* SCHOOL DISTRICT.

SUPREME JUDICIAL COURT OF MAINE, 1855.

[39 *Maine*, 559.]

ON report from *Nisi Prius*, SHEPLEY, C. J., presiding.²

Assumpsit, to recover back the sum paid on a school district tax in 1852, for building a school-house.

RICE, J. The defendant claims to recover the amount of a tax paid to the collector of the town of Fayette, for the benefit of the defendants, which he alleges was illegally assessed upon him, and which he was compelled to pay by duress, and which was paid under protest.

By duress, in its more extended sense, is meant that degree of severity, either threatened or impending, or actually inflicted, which

"We deem it a well-settled rule of law that where a party, with full knowledge of the facts, pays a demand that is unjustly made against him, and to which he has a valid defence, and where no special damage or irreparable loss would be incurred by making such defence, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain the possession of the property wrongfully withheld, or the release of his person, such payment is voluntary, and cannot be recovered. Nor will the fact that such payment was accompanied by a protest make that involuntary which otherwise would be voluntary. A protest is of no avail unless there be duress or coercion of some character, and then its only office is to show that the payment is the consequence of such duress or coercion. *Benson v. Monroe*, 7 Cush. 125; *Commissioners v. Walker*, 8 Kan. 431; *Emmons v. Seudder*, 115 Mass. 367; *Lester v. Mayor*, etc. 29 Md. 415; *Potomac Coal Co. v. Cumberland & P. R. Co.* 38 Md. 226; *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. Rep. 847; *Mariposa Co. v. Bowman*, Deady, 228; *Lamborn v. Commissioners*, 97 U. S. 181; *Powell v. Board*, 46 Wis. 210, 50 N. W. Rep. 1013."—*Wessel v. Land & Mortgage Co.* (1893) 3 N. Dak. 160; *Boston & Sandwich Glass Co. v. City of Boston* (1842) 4 Met. 181. It is immaterial that the protest is formal and written. *Railroad Co. v. Commissioners* (1878) 98 U. S. 541. And, of course, protest after payment is unavailing. *Mariott v. Brune* (1850) 9 How. (U. S.) 619.—Ed.

²The opinion only is printed.—Ed.

is sufficient to overcome the mind and will of a person of ordinary firmness. The common law has divided it into two classes, namely, duress *per minas*, and duress of imprisonment. Duress *per minas* is restricted to the fear of loss of life, or of mayhem, or loss of limb; or in other words of remediless harm to the person. 2 Greenl. Ev. § 301.

The plea of duress of imprisonment is supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. *Ibid*, § 302. To constitute duress of imprisonment, the imprisonment must be unlawful. 1 Salk. 68.

One peremptorily called upon to pay an illegal tax, by virtue of a warrant issued to a collector of taxes, may give notice that he pays it by duress, and not voluntarily, and it would seem, under such circumstances, may recover it back again. *Preston v. Boston*, 12 Pick. 7.

But where money is claimed as rightfully due, and is paid voluntarily, and with a full knowledge of all the facts in the case, it cannot be recovered back if the party to whom it has been paid may conscientiously retain it. *Brisbane v. Dacres*, 5 Taunt. 144; *Smith v. Readfield*, 27 Maine, 145. Nor can money paid under a mistake of law be reclaimed. *Norton v. Marden*, 15 Maine, 45.

A tax has been assessed against the plaintiff by the assessors of Fayette, for the benefit of the inhabitants of School District No. 8, in that town. Tax bills in which this tax was included, accompanied by a warrant for their collection, had been committed to the collector of taxes for Fayette. The plaintiff had been called upon by the collector, and payment of the tax against him demanded; he protested against paying; was arrested by the collector and carried to Augusta, when he agreed that he would pay the tax, and was thereupon discharged from his arrest by the collector. About a week after this transaction, without any further interposition, or claim on the part of the collector, so far as the case finds, the plaintiff paid the tax, and costs of arrest and conveyance to Augusta and back. Was that a voluntary payment, with a knowledge of all the facts, or was it a payment under protest, and by duress?

At common law, as it was understood before and during the reign of Elizabeth, a voluntary escape of a prisoner, in execution, completely and forever discharged him from the debt, so that neither the plaintiff nor sheriff could retake him for the same demand. Bro. Tit. Escape, Pl. 12 and 45; *Linaere v. Rhodes'* case, Leon. R. 96; *Lansing v. Fleet*, 2 Johnson's Cases, 3.

Since that time this law has been modified, or differently understood, and a voluntary escape of a debtor in execution, will not deprive the creditor of the right of procuring the rearrest of the debtor on a *new* process, or if he voluntarily return, of considering him in custody under the old; but so far as the sheriff is concerned, he cannot rearrest

the debtor on the old process. By the first arrest the writ has been obeyed, and has performed its proper function; and after a voluntary discharge the sheriff cannot arrest a second time on the same precept. If he does so, he is liable to an action for false imprisonment. *Atkinson v. Jameson*, 5 D. & E. 25; *Sheriff of Essex's case*, Hob. 202; *Vin. Ab. Escape*, p. 17; *Thompson v. Lockwood*, 15 John. 256; *Lansing v. Fleet*, 2 Johns. Cases, 3; *Com. v. Drew*, 4 Mass. 391; *Brown v. Getchell*, 11 Mass. 11.

That the collector, after the arrest, permitted the plaintiff voluntarily to escape, is too plain to require argument. After that escape the power of the collector, under his warrant, to rearrest the plaintiff was extinguished. Nor indeed is there any evidence that he again sought to enforce his warrant by another arrest, or even threatened to do so. If it be said that the tax was paid under the agreement to pay, by means of which the plaintiff procured his discharge from arrest, and that that agreement was extorted by duress, the answer is, if, as the plaintiff contends, the arrest was illegal, then the agreement was without legal consideration, and void. If it be further said that the plaintiff supposed or apprehended that he should be again arrested if he did not pay, and made the payment under the misapprehension of his legal rights, the answer is, that such a misapprehension would be a mistake of law, and not of fact.

Upon the whole, the payment of which the plaintiff now complains, must be deemed to have been made voluntarily, and with a knowledge of all the facts. The action seems to be grounded wholly on supposed technical defects in the proceedings on the part of the town and the school district. The money has been appropriated for a highly meritorious object, and there is no suggestion of oppression, improvidence or waste, on the part of the authorities of the town or district. In such a case we think the money may well be consistently retained, even though there may have been technical informalities in assessing the tax. In the view however, which we have taken of the case, it does not become necessary to examine the proceedings of the town or district; we therefore express no opinion upon that part of the case which refers to the legality of the tax.

*Plaintiff nonsuit.*¹

¹Accord: *Schultz v. Culbertson* (1879) 46 Wis. 313.—Ed.

WELLS v. PORTER & CRONKHITE.

SUPREME COURT OF NEW YORK, 1831.

[7 *Wendell*, 119.]

THIS was an action of *assumpsit*, tried at the Warren circuit in June, 1829, before the Hon. ESEK COWEN, one of the circuit judges.

The declaration contained the money counts only. The action was to recover back \$100 paid by the plaintiff, to redeem a number of hogs belonging to him, kept by Cronkhite, one of the defendants, at a distillery, for the purpose of being fatted. The hogs were taken and sold as a distress for the rent of the premises occupied by the defendants, and bought in by the plaintiff. The defendants became the *assignees* of the demised premises, on the 19th July, 1824, but did not enter into the actual possession thereof until May, 1825. The annual rent reserved on the lease was \$40 per annum. In June, 1825, the property of the plaintiff was taken on a distress warrant, issued by a *general agent* of the landlord to a *bailiff* to collect \$200, arrears of rent due on the 1st February, 1825. The agent had no *written* power of attorney or appointment, and no express authority to appoint a sub-agent or bailiff; the avails of the sale were paid to, and received by the landlord. It appeared that part of the consideration of the assignment of the demised premises to the defendants was the payment of a debt, owing by a former assignee to a third person, who held the lease by way of security. The defendants insisted that the money paid by the plaintiff was not paid for the *benefit* of the defendants, they not being personally responsible for the rent accrued previous to their entry into possession; that the payment was made without their consent or request, and that the plaintiff, if entitled to recover at all, should have brought a special action on the case. A verdict was rendered for the plaintiff subject to the opinion of this court.

By the Court, SAVAGE, Ch. J. I see no objection to the plaintiff's recovery. It is true, the assignees were not personally bound to pay any rent before the assignment, but their property was bound; the rent was a lien, an incumbrance upon the property, and constituted a part of the consideration of their purchase from a previous assignee. The money was therefore paid for the use of the defendants. They were tenants in common of the property, chargeable with the payment of the rent, if they were not partners. It does not appear that *Porter* was concerned in the distillery, nor that he was interested in the contract to keep the plaintiff's hogs; but the joint liability rests on the fact, that the property in which they were equally interested, and it appears to me jointly interested, was liable for the rent, which

is sufficient to render them jointly liable in this action. Their property was not severed; there was no apportionment of the rent; their joint property was liable for it, and was benefited by the payment.

There was no irregularity in the distress. The person issuing the warrant was the general agent of the landlord, and had power, in the name of his principal, to appoint a bailiff. If there were any doubt on that point, the authority of both the agent and bailiff was confirmed by the acts of the landlord.

The plaintiff is entitled to judgment.¹

ELLIOTT v. SWARTWOUT.

SUPREME COURT OF THE UNITED STATES, 1836.

[10 *Peters*, 137.]

ON a certificate of division from the Circuit Court of the United States for the southern district of New York.

The suit was originally instituted in the Superior Court of the city of New York, by the plaintiff against the defendant, the collector of the port of New York; and was removed by *certiorari* into the Circuit Court of the United States.

"It appears upon this report that the plaintiff in order to save his property from being sold on legal process, has been compelled to pay a debt which was really due from the defendant. Under such circumstances, the law implies a request on the defendant's part, and a promise to repay; and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. *Exall v. Partridge*, 8 T. R. 308, 1 Smith Lead. Cas. (5th Am. ed.) 70a, 73; *Hale v. Huse*, 10 Gray, 99."—*Nichols v. Bucknam* (1875) 117 Mass. 488, 491; and see *Nutter v. Sydenstricker* (1877) 11 W. Va. 535.

In the leading case of *Exall v. Partridge* (1799) 8 T. R. 308, the plaintiff had deposited his coach with the defendant, a coachmaker, from whom it was taken as a distress by the landlord for rent in arrear. Lord KENYON, his brothers concurring, reversed his *nisi prius* ruling, denying relief, and permitted a recovery against the coachmaker for money paid by the owner to secure his carriage from the landlord. Lord KENYON denied that relief depended on the theory that "where one person is benefited by the payment of money to another, the law raises an assumpsit against the former." In *England v. Marsden* (1866) L. R. 1 C. P. 529, the Common Pleas limited *Exall v. Partridge* by refusing to extend it to cases where the plaintiff's property was in the defendant's hands for the benefit of the owner. But in the later case of *Edmunds v. Wallingford* (1885) L. R. 14 Q. B. Div. 811, *England v. Marsden* was questioned and *Exall v. Partridge* sustained. The English doctrine now appears in accord with the principal case. See also *Johnson v. R. M. S. Packet Co.* (1867) L. R. 3 C. P. 38.—Ed.

The action was *assumpsit*, to recover from the defendant the sum of thirty-one hundred dollars and seventy-eight cents, received by him for duties, as collector of the port of New York, on an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of fifty per centum *ad valorem*, under the second clause of the second section of the act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports," as manufactures of wool, or of which wool is a component part. The plea of *non-assumpsit* was pleaded by the defendant in bar of the action.

The following points were presented during the progress of the trial for the opinion of the judges; and on which the judges were opposed in opinion¹:—

Second. Whether the collector is personally liable in an action to recover back an excess of duties, paid to him as collector; and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him.

Third. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid, in the regular and ordinary course of his duty, into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the treasury department; a notice having been given, at the time of payment, that the duties were charged too high, and that the party paying so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid; and a notice not to pay over the amount into the treasury.

These several points of disagreement were certified to this court by the direction of the judges of the Circuit Court.

Mr. Justice THOMPSON delivered the opinion of the court.

2. The case put in the second point is where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States. The manner in which the question is here put presents the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is therefore to be considered as a voluntary payment, by mutual mistake of law; and, in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each

¹Only so much of the case is given as relates to the second and third points raised.—Ed.

presumed to know it. Any instruments from the treasury department could not change the law, or affect the rights of the plaintiff. He was not bound to take and adopt that construction. He was at liberty to judge for himself, and act accordingly. These instructions from the treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this that the party cannot sue the United States. The case put in the question is one where no suit would lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right.

The case of *Morgan v. Palmer*, 2 B. & C. 729, was an action for money had and received, to recover back money paid for a certain license; and one objection to sustaining the action was that it was a voluntary payment. The court did not consider it a voluntary payment, and sustained the action; but Chief Justice ABBOT, and the whole court, admitted that the objection would have been fatal, if well-founded in point of fact. The court said it had been well argued, that the payment having been voluntary it could not be recovered back in an action for money had and received. And in *Brisbain v. Dacres*, 5 Taunt. 154, the question is very fully examined by GIBBS, J., and most of the cases noticed and commented upon, and with the concurrence of the whole court, except CHAMBRE, J., he lays down the doctrine broadly, that where a man demands money of another, as matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily, he cannot recover it back. It may be, says the judge, that, upon a further view, he may form a different opinion of the law; and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise. There are many doubtful questions of law. When they arise, the defendant has an option either to litigate the question, or submit to the demand and pay the money. But it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be

at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money. This doctrine is peculiarly applicable to a case where the money has been paid over to the public treasury, as in the question now under consideration. Lord ELDON in the case of *Bromley v. Holland*, 7 Vesey, 23, approves the doctrine, and says it is a sound principle that a voluntary payment is not recoverable back. In *Cox v. Prentice*, 3 M. & S. 348, Lord ELLENBOROUGH says: "I take it to be clear, that an agent who receives money for his principal is liable, as a principal, so long as he stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it." And in *Buller v. Harrison*, 2 Cowp, 568, Lord MANSFIELD says the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong, and the plaintiff must call on the principal; that if, after the payment has been made and before the money has been paid over, the mistake is corrected, the agent cannot afterwards pay it over without making himself personally liable. Here, then, is the true distinction: When the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake and required not to pay it over, he is personally liable. The principle laid down by Lord ELLENBOROUGH, in *Townsend v. Wilson*, 1 Campb. 396, cited and relied upon on the part of the plaintiff, does not apply to this case. He says, if a person gets money into his hands illegally, he cannot discharge himself by paying it over to another; but the payment, in that case, was not voluntary; for, says Lord ELLENBOROUGH, the plaintiff had been arrested and was under duress when he paid the money. In *Stevenson v. Mortimer*, 2 Cowp. 816, Lord MANSFIELD lays down the general principle, that if money is paid to a known agent, and an action is brought against the agent for the money, it is an answer to such action that he has paid it over to his principal. That he intended, however, to apply this rule to cases of voluntary payments made by mistake, is evident from what fell from him in *Sadler v. Evans*, 4 Bur. 1987. He there said, he kept clear of all payments to third persons but where it is to be a known agent: in which case the action ought to be brought against the principal, unless in special cases, as under notice, or *mala fides*; which seems to be an admission that if notice is given to the agent before the money is paid over, such payment will not exonerate the agent. And this is a sound distinction, and applies to the two questions put in the second and third points in the case now before the court. In the former, the payment over is supposed to be without notice; and in the latter after notice and a request not to pay over the money. The answer, then, to the second question is, that under the facts there stated the collector is not personally liable.

3. The case put by the third point is where, at the time of payment, notice is given to the collector that the duties are charged too high, and that the party paying so paid to get possession of his goods; and accompanied by a declaration to the collector, that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury.

This question must be answered in the affirmative; unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him; but that recourse must be had to the government for redress. Such a principle would be carrying an execution to a public officer beyond any protection sanctioned by any principles of law or sound public policy. The case of *Irving v. Wilson and Another*, 4 T. R. 485, was an action for money had and received, against custom-house officers, to recover back money paid to obtain the release and discharge of goods seized that were not liable to seizure; and the action was sustained. Lord KENYON observed, that the revenue laws ought not to be made the means of oppressing the subject; that the seizure was illegal; that the defendants took the money under circumstances which could by no possibility justify them; and, therefore, this could not be called a voluntary payment.

The case of *Greenway v. Hurd*, 4 T. R. 554, was an action against an excise officer, to recover back duties illegally received; and Lord KENYON does say, that an action for money had and received will not lie against a known agent, but the party must resort to the superior. But this was evidently considered a case of voluntary payment. The plaintiff had once refused to pay, but afterwards paid the money; and this circumstance is expressly referred to by BULLER, J., as fixing the character of the payment. He says, though the plaintiff had once objected to pay the money, he seemed afterwards to waive the objection by paying it. And Lord KENYON considered the case as falling within the principle of *Sadler v. Evans*, 4 Bur. 1984, which has already been noticed. In the case of *Snowdon v. Davis*, 1 Taunt. 358, it was decided that an action for money had and received would lie against a bailiff, to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The court say, the money was paid by the plaintiff under the threat of a distress; and although paid over to the sheriff and by him into the Exchequer, the action well lies: the plaintiff paid it under terror of process to redeem his goods, and not with intent that it should be paid over to any one. The case of *Ripley v. Gelston*, 9 Johns. 201, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment, as being illegal, but paid it for the purpose of obtaining the clearance, and the money had been paid by the collector into

the branch bank to the credit of the treasurer. The defence was put on the ground that the money had been paid over; but this was held insufficient. The money, say the court, was demanded as a condition of the clearance; and that being established, the plaintiff is entitled to recover it back, without showing any notice not to pay it over. The cases which exempt an agent do not apply. The money was paid by compulsion. It was extorted as a condition of giving a clearance, and not with intent or purpose to be paid over. In the case of *Clinton v. Strong*, 9 Johns. 369, the action was to recover back certain costs which the marshal had demanded on delivering up a vessel which had been seized, which costs the court considered illegal; and one of the questions was whether the payment was voluntary. The court said the payment could not be voluntary. The costs were exacted by the officer, *colore officii*, as a condition of the redelivery of the property; and that it would lead to the greatest abuse to hold that a payment under such circumstances was a voluntary payment precluding the party from contesting it afterwards. The case of *Hearsey v. Pryn*, 7 Johns. 179, was an action to recover back toll which had been illegally demanded; and SPENCER, J., in delivering the opinion of the court, says the law is well settled, that an action may be sustained against an agent who has received money to which the principal had no right, if the agent has had notice not to pay it over. And in the case of *Fry v. Lockwood*, 4 Cow. 456, the court adopts the principle, that when money is paid to an agent for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. But the distinction taken in the case of *Ripley v. Gelston* is recognized and adopted; that the cases which exempt an agent when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition, etc. From this view of the cases, it may be assumed as the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal; if he has had notice not to pay it over. The answer, therefore, to the third point must be, that the collector is personally liable to an action to recover back an excess of duties paid to him as collector, under the circumstances stated in the point; although he may have paid over the money into the treasury.

On the second question, it is the opinion of this court, that, under the facts as stated in the said second question, the collector is not personally liable.

On the third question, it is the opinion of this court that the collector, under the circumstances as stated in the said question, is liable to an action to recover back an excess of duties paid to him as collector, although he may have paid over the money into the treasury. Whereupon it is ordered and adjudged by this court, to be so certified to the

said Circuit Court of the United States for the southern district of New York.¹

3. IN DISCHARGE OF AN OBLIGATION.

(a) *The Doctrine in General.*

BROWN v. HODGSON.

COMMON PLEAS, 1811.

[4 *Taunton*, 189.]

PAYNE sent butter to London consigned to Pen, by the hands of the plaintiff, a carrier, who by mistake delivered it to the defendant, and he appropriated it to his own use, selling it and receiving the money. Pen had paid Payne for the butter, and Brown, admitting the mistake he had made, paid Pen the value. The plaintiff declared for goods sold and delivered, and for money paid; and delivered to the defendant a bill of particulars, "To seventeen firkins of butter, £55 6s.," not saying for goods sold. It was objected for the defendant, that there was no contract of sale, either express or arising by implication of law between the parties, upon this transaction, and that although the plaintiff might have recovered in trover, he could not bring assumpsit for goods sold; the count for money paid was not adverted to at the trial. The jury found a verdict for the plaintiff.

Vaughan, Serjt., in this term, obtained a rule *nisi* to set aside the verdict; and

Shepherd, Serjt., now showed cause against it.

MANSFIELD, C. J. At the trial my attention was not called to the count for money paid, but upon this count I think the action may be sustained. The plaintiffs pay Pen on account of these goods being wrongfully detained by Hodgson; they pay the value to the person to whom both they and Pen were bound to pay it; and this, therefore, is not the case of a man officiously and without reason paying money for another; and therefore the action may be supported. As to the objection taken respecting the bill of particulars, bills of particulars

¹In 3 Notes on U. S. Reports (Rose) 553, will be found an elaborate note on this case, in which are collected the federal cases following or distinguishing it, as also the state cases approving or disapproving its doctrine. Cf. Atlee v. Backhouse (1838) 3 M. & W. 633; Taylor v. Board of Health (1855) 31 Pa. St. 73; Joyner v. Third School Dist. (1849) 3 Cush. 567; Chegaray v. Mayor (1853) 2 Duer, 521; Sumner v. First Parish, etc. (1826) 4 Pick. 361.—ED.

are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant that the plaintiff's claim arises on account of the butter.

HEATH, J. We must not drive parties to special pleaders to draw their bills of particulars.

*Rule discharged.*¹

DAWSON v. LINTON.

KING'S BENCH, 1822.

[5 *Barnwell & Alderson*, 521.]

ASSUMPSIT upon several special counts, and also for money paid to the use of the defendant. Plea, the general issue.

A local act provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same respectively; that such tenants should and might deduct and retain the tax in question out of the rents payable to their landlords; that in case of neglect to pay, the tax might be levied by distress on goods and chattels found on the lands charged with the tax in arrear; that if the land should be untenanted, or no sufficient distress could be found, the lands and goods chargeable should remain as a surety for the payment thereof, taken possession of, and rented in discharge of the tax.

At the trial, it was contended that the succeeding tenant was liable for the tax and that the action should have been against him.²

ABBOTT, C. J. It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it; he has therefore a right to call upon the landlord to repay it to him. I think the meaning of the act was to make the tax payable by the tenant in whose time it became due, and who received the benefit of the drainage. If it had then been paid, the plaintiff might have deducted it from his rent; but as he was not called on to pay it till after the rent had been paid, I think he has now the right to require the landlord to reimburse him. It might be very hard, if the new tenant were to be compelled to advance money to pay the tax for his

¹*Sills v. Laing* (1814) 4 Campb. 81, a *nisi prius* decision of Lord ELLENBOROUGH, is contra.

For kindred cases and a discussion of the principle involved, see 2 Greenleaf's Evidence (16th ed.) § 114; 1 Smith's Leading Cases, 6th Am. ed., 381; 9th Am. ed., 443, note. And see the following additional cases: *Van Santen v. Standard Oil Co.* (1880) 81 N. Y. 171; *Metropolitan R. R. Co. v. District of Columbia* (1889) 132 U. S. 1, 12.—Ed.

²Statement substituted for that of the original report.—Ed.

predecessor, even though ultimately he would be entitled to recover it. Here, the action is only for money paid for the defendant, and not for any special damage arising from the distress. The verdict is therefore right.

Rule discharged.¹

LEWIS v. CAMPBELL.

COMMON PLEAS, 1849.

[8 *Manning, Granger and Scott*, 541.]

THIS was an action of debt, for money paid, money had and received, and on an account stated. The defendant pleaded that she was never indebted.

The cause was tried before WILDE, C. J., at the London sittings after Hilary term, 1848, when the material facts appeared to be, that the plaintiff, John William Lewis, being indebted to Richard Duke in £112. 16s. 6d., gave him an order for payment of that sum, on Macdonald & M'Queen, who were agents to the plaintiff. When Duke presented the order for payment Macdonald & M'Queen refused to pay the money, but told Duke that they would pay the amount to Mrs. Campbell, the defendant, for whom they were authorized to collect debts, in part payment of a debt of £350, which the defendant, claimed as due to her from Duke. Macdonald & M'Queen accordingly debited the plaintiff, and credited the defendant, with the amount of the order, and gave the plaintiff, on behalf, and in the name of, the defendant, on the 29th of August, 1843, a letter stating that the sum of £112. 16s. 6d., owing by the plaintiff to Duke, being attached by her in the hands of the plaintiff's agents, she undertook to exonerate and bear him harmless against any steps which Duke might take against him in respect of that sum. These transactions were communicated to the defendant, who approved of what her agents had done, and claimed the amount mentioned in the order, as a debt due to her from Macdonald & M'Queen, and received a dividend on it, when they became bankrupts. Afterwards, in 1846, an action was brought by Duke against the present plaintiff, which was defended, in his name, and by his per-

¹But compare *Spencer v. Parry* (1835) 3 A. & E. 331.

So a trustee under a will who paid a legacy duty upon an annuity recovered the amount so paid in assumpsit from the legatee. *Hales v. Freeman* (1819) 1 Brod. & B. 391; so where the plaintiff deposited with defendant as security for goods sold, a bill accepted for which plaintiff had received no value and defendant after payment of the goods indorsed the bill for value. *Bleaden v. Charles* (1831) 7 Bing. 246; but see *Asprey v. Levy* (1847) 16 M. & W. 851.—Ed.

mission, by Mrs. Campbell, the present defendant,—pleading, amongst other things, that the debt due from the plaintiff to Duke had been paid, by his consent, to the present defendant. This defence, however, was unsuccessful; and the present plaintiff was compelled to pay £160. 13s. 6d., the amount for which Duke obtained judgment, in order to avoid being taken under a *capias ad satisfaciendum*.

Upon this state of facts, a verdict was taken for the plaintiff for £160. 13s. 6d., with the liberty to the defendant to move to enter a nonsuit, or to reduce the verdict to £112. 16s. 6d.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court [after stating the facts, *ut antè*]:—

The argument turned mainly upon the question, whether the count for money paid, was sustained by the facts in evidence. And in the view we take of the case, it will not be necessary to discuss any other question. It appears to us, that the defendant, being bound by her guarantee to indemnify the plaintiff against Duke's action, and the plaintiff having, at the request of the defendant, taken upon himself the character of defendant in that action, and having permitted the defendant to conduct the defence, and the defendant having acted on that permission, an implied contract was raised on the part of the defendant, to pay anything which might be necessary, in the event of a judgment being obtained against the defendant, for the protection of the plaintiff against the consequences of that judgment; and, in the event of the defendant's failure to make such payment, that an authority from her was to be implied, authorizing the plaintiff to make the payment for her, so as to make it money paid to her use.

Thus it was, that, in the case of *Howes v. Martin*, 1 Esp. N. P. C. 162, where the plaintiff had accepted a bill for the defendant, and had, at his request, defended an action brought on the bill, and had paid the debt and costs recovered in that action, Lord KENYON held that the amount was money paid by the plaintiff to the use of the defendant, on the ground that, as the defendant was personally interested, and had directed the defence to be made, by which he might have been benefited, the money must be considered to have been laid out by the plaintiff on his account and to his use.

In the case of *Brittain v. Lloyd*, 14 M. & W. 762, the plaintiff, an auctioneer employed by the defendant to sell some property, had incurred a liability to pay the auction-duty, and had been compelled to pay it; and the court held that he might recover the amount as money paid to the defendant's use. The reason of that decision appears to us to comprehend the present case. "It is clear," the court says, in its judgment, "that if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money

paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one asks another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay; and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it."

The case mainly relied on by the defendant, on the argument of the present case, was that of *Spencer v. Parry*, 3 Ad. & E. 331; 4 N. & M. 770, where the plaintiff had let a house to the defendant, at a rent of £42, "free and clear of all land-tax and parochial taxes," the defendant left the premises without paying the taxes, which the plaintiff, under certain local acts, was compelled to pay: the court held that this money could not be recovered under a count for money paid to the defendant's use; but that the plaintiff ought to have sued on the express agreement to pay £42, clear of land-tax, &c., remaking (with reference to certain cases in which money paid to relieve a defendant from a liability under which he lay to a third person for payment of money, was recovered under the count for money paid) that "here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them; the tax remained due by his default, which would give a remedy on the agreement, but it was paid to one who had no claim upon him, and therefore not to his use."

If the Court of Queen's Bench in that case are to be considered as deciding, generally, that an action for money paid would lie in no case where the defendant was not relieved from a liability to a third person, the decision would apply to the present case, but certainly could not be maintained, inasmuch as there are many cases, as observed by the court in the case of *Brittain v. Lloyd*, in which the action can be maintained, though the defendant has not been relieved from a liability; *i. e.* all the cases in which, though no such relief from liability occurs, a request to pay, and a promise to repay, are expressed or implied.

But the Court of Queen's Bench is not, as we understand the case of *Spencer v. Parry*, to be taken to have decided any such general proposition in that case; the remark above cited being intended only

to show that the ground of an inference of a request to pay and a promise to repay, which is afforded by a compulsory payment to a third person, by the plaintiff, of a debt due to that third person by the defendant, as in *Exall v. Partridge*, 8 T. R. 308, where the plaintiff's goods had been distrained for rent due from the defendants, could not exist in the case of *Spencer v. Parry*. That case was decided for the defendant, not in the absence of *that* ground only, but because the court were of opinion that neither *that ground* nor any other on which an inference of a request to pay and promise to repay, could be sustained, was to be found in that case.

In that case, the liability of the plaintiff to pay the taxes was not incurred at the request of the defendant, but was antecedent to, and was not affected by, the transaction between the plaintiff and defendant; and the court by no means decided that, if the plaintiff incurs a liability *at the request of the defendant*, though for a payment to which the defendant was not previously liable, money paid would not lie. In the argument of that case, a case having been referred to, where an action had been defended by the plaintiff at the request of the defendant, in which the plaintiff had been obliged to pay the costs, PATTESON, J., observed, that, in that case, the action had been defended at Hemley's (the defendant's) request; adding, if a man pays a debt for another, at his request, no doubt he may recover the amount as money paid.

We do not think that the present case is open to the objection, that the defendant, having expressly agreed to indemnify the plaintiff, can be sued only on the special contract, and that no implied contract to support a count for money paid is to be inferred from that agreement; for, even if it were to be conceded that such a count could not be supported by the evidence of a contract to indemnify, in the terms of the letter of August, 1843, and the payment by the plaintiff, *alone*, we think there is good ground for such an inference in the present case, where, after the special agreement, the plaintiff permitted the defendant to defend the action in his name. From such permission, and from the conduct of the defendant in acting upon it, we think an authority to pay on account of the defendant such sum as the plaintiff might be compelled to pay Duke, to relieve himself from a *capias ad satisfaciendum*, and a promise to repay it, are to be inferred, supposing them not to be included in the special contract to indemnify.

For these reasons, we think the rule must be discharged.

Rule discharged.¹

¹Accord: *Emery v. Hobson* (1873) 62 Me. 578, in which the briefs of counsel (practically exhausting the authorities) are printed at length.—Ed.

GREAT NORTHERN RAILWAY COMPANY v. SWAFFIELD.

COURT OF EXCHEQUER, 1874.

[*Law Reports*, 9 *Exchequer*, 132.]

APPEAL from the Bedfordshire county court.

This was an action brought to recover the sum of £17, paid by the plaintiffs to a livery stable keeper for the keep of the defendant's horse, under the following circumstances:

The defendant sent a horse by the plaintiff's railway directed to himself to Sandy. On the arrival of the horse at Sandy Station at night there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day, the defendants came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable.

The plaintiffs afterwards offered to deliver the horse to the defendant at Sandy without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time.

Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it.

The case was heard (without a jury) before the learned judge of the county court, who gave judgment for the defendant; the plaintiffs appealed.

The question stated for the opinion of the court was, whether the plaintiffs were entitled to recover the whole or any part of the livery charges from the defendant; and if the court should be of opinion that they were so entitled, judgment was to be entered for them for the amount of the charges, or such part thereof as the court should think fit, with such costs as the court should direct.¹

KELLY, C. B. We are all clearly of opinion that this judgment must be set aside, and judgment entered for the plaintiffs for £17. It appears that the defendant caused a horse to be sent by the plaintiffs' railway to Sandy station; but the horse was not directed to be

The defendant had previously brought an action against the plaintiffs for the detention of the horse; the plaintiffs paid money into court in respect of the detention of the horse before the defendant's refusal to receive him. The cause was tried before BRAMWELL, B., at the Bedford summer assizes, 1873, and a verdict was found for the then defendants, the now plaintiffs.

taken to any particular place. The owner ought to have had some one ready to receive the horse on his arrival and take him away; but no one was there. It does not appear that there was at the station any stable or other accommodation for the horse; and the question arises, what was it, under those circumstances, the plaintiffs' duty, and consequently what was it competent for them to do? I think we need do no more than ask ourselves, as a question of common sense and common understanding, had they any choice? They must either have allowed the horse to stand at the station,—a place where it would have been extremely improper and dangerous to let it remain; or they must have put it in safe custody, which was what in fact they did in placing it in the care of the livery stable keeper. Presently the defendant's servant comes and demands the horse. He is referred to the livery stable keeper, and it may be (I do not say it is so) that upon what passed on that occasion the defendant might have maintained an action against the plaintiffs for detaining the horse.¹ But the next day the defendant comes himself; the charges now amount to 2s. 6d.; an altercation takes place about this trumpery sum, and ultimately the station-master offers to pay the charges himself if the defendant will take the horse away; but the defendant refuses, and leaves the horse at the stable. Then a correspondence ensues between the parties, in which the defendant is told that he can have the horse without payment if he sends for it, but he refuses, and says that unless the horse is sent to him with 30s. for expenses and loss of time by tomorrow morning, he will not accept it at all; and he never sends for the horse. Meanwhile the plaintiffs run up a bill of £17 with the livery stable keeper with whom they placed the horse, which they ultimately have to pay; and at last they send the horse to the defendant, who receives it; and they now sue him for the amount so paid.

I am clearly of opinion that the plaintiffs are entitled to recover. My Brother POLLOCK has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstance, finds it necessary for the safety of the cargo to incur expenditure, is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road, to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit.

¹See note on previous page.

PIGOTT, B. I am of the same opinion. I do not think we have to deal with any question of lien. We have only to see whether the plaintiffs necessarily incurred this expense in consequence of the defendant's conduct in not receiving the horse, and then whether, under these circumstances, the defendant is under an implied obligation to reimburse them. I am clearly of opinion that he is. The horse was necessarily put in the stable for a short time before the defendant's man arrived. I give no opinion on what then passed, whether the man was right, or whether the plaintiffs were right; I think it is not material. On the following day the defendant comes himself; and the basis of my judgment is, that at that time the station-master offered, rather than the defendant should go away without the horse, to pay the charge out of his own pocket; but the defendant declared he would have nothing to do with it, and went away. That I understand to be the substance of what was proved; and if that be so, it shows to me that there was a leaving of the horse by the defendant in the possession of the carriers, and a refusal to take it. Then what were the carriers to do? They were bound, from ordinary feelings of humanity, to keep the horse safely and feed him; and that became necessary in consequence of the defendant's own conduct in refusing to receive the animal at the end of the journey according to his contract. Then the defendant writes and claims the price of the horse; and then again, in answer to the plaintiffs' offer to deliver the horse without payment of the charges, he requires delivery at his farm and the payment of 30s.; in point of fact, he again refuses the horse. Upon the whole, therefore, I come to the conclusion that, whoever was right on the night when the horse arrived, the defendant was wrong when, on the next day, he refused to receive him; that the expense was rightly incurred by the plaintiffs; and that there was, under these circumstances, an implied contract by the defendant entitling the plaintiffs to recover the amount from him.

POLLOCK, B. I am of the same opinion. If the case had rested on what took place on the night when the horse arrived, I should have thought the plaintiffs wrong, for this reason, that although a common carrier has by the common law of the realm a lien for the carriage, he has no lien in his capacity as warehouseman; and it was only for the warehousing or keeping of this horse that the plaintiffs could have made any charge against the defendant.

But the matter did not rest there; for it is the reasonable inference from what is stated in the case, that on the next day, when the defendant himself came, he could have had the horse without the payment of anything; but he declined to take it, and went away. Then comes the question, first, What was the duty of the plaintiffs, as carriers, with regard to the horse? and secondly, If they incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse? Now, in my opinion

it was the duty of the plaintiffs, as carriers, although the transit of the horse was at an end, to take such reasonable care of the horse as a reasonable owner would take of his own goods; and if they had turned him out on the highway, or allowed him to go loose, they would have been in default. Therefore they did what it was their duty to do. Then comes the question, Can they recover any expenses thus incurred against the owner of the horse? As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled. It has been long debated whether a shipowner has such a right, and gradually, partly by custom and partly by some opinions of authority in this country, the right has come to be established. It was clearly held to exist in the case of *Notara v. Henderson*, L. R. 7 Q. B. 225, at pp. 230-235, where all the authorities on the subject are reviewed with very great care; and that case, with some others, was cited and acted upon by the privy council in the recent case of *Cargo ex Argos*, L. R. 5 P. C. 134. The privy council is not a court whose decisions are binding on us sitting here, but it is a court to whose decisions I should certainly on all occasions give great weight: and their judgment on this point is clearly in accordance with reason and justice. It was there said, L. R. 5 P. C. p. 164 (after referring to the observations of Sir JAMES MANSFIELD, C. J., in *Christy v. Row*, 1 Taunt. 300), "The precise point does not seem to have been subsequently decided, but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined." Then, after citing the cases, the judgment proceeds: "It results from them, that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." That seems to me to be a sound rule of law. That the duty is imposed upon the carrier, I do not think any one has doubted: but if there were that duty without the correlative right, it would be a manifest injustice. Therefore, upon the whole of the circumstances, I come to the conclusion that the claim of the company was a proper one, and that the judgment of the learned judge of the county court must be reversed.

AMPHILETT, B. I am of the same opinion. It appears to me that this case, though trumpery in itself, involves important principles. I think it is perfectly clear that the railway company, when the horse arrived at the station, and no one was there to receive it, were not only entitled but were bound to take reasonable care of it. As a matter of common humanity, they could not have left the horse without food during the whole night, and if they had turned it out on to the road

they would not only have been responsible to the owner, but if any accident had happened to the general public, they would have incurred liability to them. Therefore, as it appears to me, there was nothing that they could reasonably do except that which they did, namely, send it to the livery-stable keeper to be taken care of.

Then comes the question discussed by my Brother POLLOCK, and on which I should not dissent from him without great diffidence, whether a lien existed for these charges. As at present advised, I should not wish to be considered as holding that in a case of this sort, the person who, in pursuance of a legal obligation, took care of a horse and expended money upon him, would not be entitled to a lien on the horse for the money so expended. But really the point does not arise: whatever might be the case with regard to it, that question appears to me to be got rid of by what followed; because, even if the company were wrong in claiming payment of the 6d., or whatever the sum might be, on the night when the horse arrived, the whole thing was set right by them on the next day, when the defendant himself came to the station, and the station-master offered to pay the charge in order that the defendant might have the horse. The defendant refused that very reasonable offer; and what, then, was the company to do with the horse? What else should they do but leave it with the livery-stable keeper, where it was being taken care of? At last, after a bill of £17 had been incurred, the horse was sent to the defendant, and the question is, who is to pay that sum of £17?

Now, who was in the wrong? Even if the plaintiffs were in the wrong originally, of which I am by no means sure, in not giving up the horse on the night when it arrived, at any rate from the time when that was set right it was the defendant who was in the wrong, and the company who were in the right. It appears to me, therefore, quite clear that the company are entitled to recover the money which they have been obliged to pay, and have paid, to the livery stable keeper, and that the judgment of the learned judge of the county court must be reversed, and judgment entered for the plaintiffs.

*Judgment reversed.*¹

¹See *Sceva v. True* (1873) 53 N. H. 627 (*ante* 75), in which this case is quoted with approval.

It will be noted that this case was decided under the influence of supposed admiralty precedent. The English common law would seem to be contra.

In a very carefully considered case, *British Empire Shipping Co. v. Somerset* (1858) E. B. & E. 353, it appeared that a ship was repaired in a dock, and that the owners were not prepared to pay the price. The shipwrights thereupon gave notice that they would detain the ship and claim £21 a day for the use of the dock during detention. The shipowner finally paid, under protest, the amount claimed, together with the sum claimed, for dock rent. On a suit to recover the sum thus paid, it was held that the shipwrights had no lien

(b) SPECIFIC APPLICATIONS OF THE DOCTRINE.

DE LEGE RHODIA DE JACTU.¹

JUSTINIAN, DIGEST, LIB. 14, TIT. 2, ART. 1.

PAULUS *libro secundo sententiarum*. Lege Rhodia cavetur ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarcariatur quod pro omnibus datum est.

Æquissimum enim est commune detrimentum fieri eorum qui, propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerunt.²

for the use of the dock during the detention. In the course of his judgment, Lord CAMPBELL, C. J., said:

"It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it. *Hartley v. Hitchcock*, 1 Stark. 408.

"The right of detaining goods on which there is a lien is a remedy to the party aggrieved, which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray, *Henly v. Walsh*, 2 Salk. 686, the distrainer of goods which have been replevied cannot claim any lien upon them. *Bradyll v. Ball*, 1 Bro. C. C. 427. So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep. *Bul. N. P.* 45.

"If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, 'the cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore. *Co. Litt.* 47b."

On appeal to the Exchequer Chamber this judgment of the Q. B. was affirmed (*E. B. & E.* 367), and on further appeal to the House of Lords this august body affirmed the judgment. *Somes v. British Empire Co.* (1860) 8 H. L. 337.—Ed.

¹It is not the intention of the present section to develop in detail the doctrine of general average, but to show, in a general way, that the duty to contribute is an obligation imposed by law, or custom, having the force of law, and as such recognized and enforced as a quasi-contractual duty by appropriate suit in equity, or by *assumpsit* in courts of common law.

For the various instances of general average, see *Ames' Cases on Admiralty*, 293, *et seq.*—Ed.

²"The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand and the benefit derived on the other." *BOVILL, C. J.*, in *Fletcher v. Alexander* (1868) L. R. 3 C. P. 375, 382.

In other words: "*Nemo debet locupletari alienâ jacturâ.*"—Ed.

HICKS v. PALINGTON.

COURT OF REQUESTS, EASTER TERM, 1590.

[*Moore*, 297.]

I WAS of counsel for one John Hicks, plaintiff, against Palington and Others, defendants, merchants of Bristol; and the complaint was for average of a ship despoiled of certain goods shipped from Bristol to Galicia in Spain. And Doctor Dale, Master of the Requests, said that by the civil law average is not due, unless the goods are lost in such manner that the rest of the goods in the ship are thereby saved; as, if goods of one of the merchants are cast into the sea *navis levandi causa*, then the other merchants shall pay average, for the other goods are saved thereby.¹ So if a part of the goods be given to a pirate by way of composition to save the rest; but not if a pirate seized a part by force, in that case there shall be no average paid.² Still it was decreed for me, because the merchants had agreed to pay average after the ship was robbed.

BIRKLEY AND OTHERS v. PRESGRAVE.

KING'S BENCH, 1801.

[1 *East*, 220.]

THE plaintiffs were owners of the ship *Argo*, and the defendant was the owner of a cargo of wheat on board the said ship—on a voyage from Wisbeach to Sunderland. As the ship was entering the harbor it was necessary to sacrifice certain of the ship's tackle, valued at £20, in order to save vessel and cargo. It likewise appeared that the vessel sustained damage to the value of £50.

In the first count the plaintiff set out the facts specially as above and the declaration contained count in indebitatus assumpsit for money due and payable for a general average; the other, for money paid, laid out and expended, with the common breach to the whole. The defendant pleaded non assumpsit.

On trial, the jury found a verdict of £19 12s. and on judgment entered for that amount an appeal was taken.

¹Accord: *Whitefield v. Garrade* (1540) 1 Sel. Pl. in Ad. (Seld. Soc'y) 95; *Price v. Noble* (1811) 4 Taunt. 123; *Johnson v. Chapman* (1865) 19 C. B. (N. S.) 563; *Fletcher v. Alexander* (1868) L. R. 3 C. P. 375, 381; *The St. Joseph* (1855) 6 McLean, 573.—Ed.

²*Nesbitt v. Lushington* (1792) 4 T. R. 783.—Ed.

The question for the opinion of the court was, whether an action can be maintained for the loss, damage, and expenses above mentioned?²¹

LORD KENYON, C. J. If the law confer a right, it will also confer a remedy. When once the existence of the right is established, the Court will adopt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon. Here the only difficulty pretended is the ascertainment of the proportion to be paid of the general loss in each particular case; and since it is admitted, that this may be ascertained in equity, there seems to be no reason why if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected, that this will lead to a multiplicity of actions. The same difficulty, however, must occur in equity.² Upon the whole, this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions: where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law; and wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay. With respect to the other question, all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship owners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average. The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence in order to avoid dispute, than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation. Here however there can be no difficulty, for it is found in fact that the cutting of the cable which belonged to the ship was done for the benefit of the cargo as well as the ship.

GROSE, J. This action is brought to recover a ratable proportion of a certain loss and damage, and expenses which have been incurred by the plaintiffs as ship owners in preventing the owner of the cargo from incurring a loss. That such an action is maintainable I have no doubt. If there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy: for I understand that this sort of damage has been continually settled as general average in the city of *London*. Where there is a right, there must be a remedy; and there can be no other remedy

²¹This statement, much abridged and modified, is substituted for that of the original report, and the arguments of counsel are omitted.—ED.

²His Lordship's discussion of this question is omitted.—ED.

than by action to recover damages. It is true, where there are many owners of the cargo there may be as many actions brought, but that arises from the necessity of the thing; and I should still say, that they are all liable to answer for their respective proportions.

LAWRENCE, J. All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a court of equity, where he can obtain proof of it more easily, and thereby facilitate his remedy. But that objection does not prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a court of equity.

LE BLANC, J. Unless it be shewn by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right it also gives a remedy.

Postea to the Plaintiffs.¹

SIMONDS AND LODER *v.* WHITE.

KING'S BENCH, 1824.

[2 *Barnewall and Cresswell*, 805.]

ASSUMPSIT for £106 3s. 6d., as money paid by the plaintiffs to the use of the defendant.

ABBOTT C. J. now delivered the judgment of the Court. The question in this case is, whether the plaintiffs, the proprietors of certain goods carried on board the defendant's ship from *Gibraltar* to *Petersburgh*, and who were compelled at *Petersburgh* to pay to the defend-

¹See *Marsham v. Dutrey*, Select Cas. of Evid. 58 S. P.; *Maggrath v. Church* (1803) 1 Caines, 196; *Whitteridge v. Norris* (1809) 6 Mass. Rep. 125; *Sims v. Gurney & al.* (1812) 4 Binn. 513.

"In case of dispute, the contribution may be recovered either by a suit in equity (*Shepherd & Others v. Wright*, Shower's Parl. Cas. 18), or by an action at law (*Marsham v. Dutrey*, Select Cases of Evid. 58; *Birkley & Others v. Presgrave*, 1 East, 220; *Dodson & Others v. Wilson*, 3 Campbell, 480), instituted by each individual entitled to receive, against each party, that ought to pay for the amount of his share." *Abbott's Shipping* (5th ed.) 362.

See also, *Strang, Steel & Co. v. Scott & Co.* (1889) L. R. 14 A. C. 601, 606.—Ed.

ant, in order to obtain possession of their goods, a sum of money as a contribution to a general or gross average, settled at *Petersburgh* according to the law of *Russia*, can recover back so much of the money thus paid, as would not have been charged to them on an adjustment of average made according to the law of *England*, the ship being a *British* ship, and all the parties *British* subjects. And we are all of opinion that the plaintiffs cannot recover back this money.

The principle of general average, namely that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract: but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also, that all are agreed on another point; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them, shall be either paid or secured to his satisfaction. This appears by the case to be the law of *Russia*. This power is noticed in the civil law, *Dig.* lib. 14. tit. 2. 2. It is expressly given in the *Consulat*, c. 98., recognized by *Cleirac* in his commentary on the *Jugemens d' Oleron*, tit. 35., and allowed by the *French Ordinance of Marine*, tit. *Du. Jet.* art. 21. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted?¹

The law of the country [place of destination] must prevail. And this will not impugn any known doctrine or rule of the *English* law. The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us, to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract. It is of infinite importance to maritime commerce, that its regulations should be as simple and as few in number as general

¹The discussion of this question is omitted.—ED.

justice will permit. The wisest and most equitable rules may occasionally, in a particular case, be productive of an inconvenience, but such occasional and particular inconvenience is a much less evil, than the confusion and uncertainty that never fail to accompany a multiplicity of minute regulations. For these reasons we are of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

PIRIE & CO. v. MIDDLE DOCK CO.

NISI PRIUS, QUEEN'S BENCH DIVISION, 1881.

[44 *Law Times*, N. S. 426.]

PIRIE & Co. shipped a cargo of coals upon the defendant's ship, *Attila*, to be carried to Singapore, and there delivered on payment of freight. A fire broke out spontaneously in the coals, so that portions had to be thrown overboard, and the remainder were so wetted and damaged by water poured upon them to extinguish the fire that they were necessarily discharged and sold at a port of refuge. Owing to the fact that no freight was payable upon them at the port of refuge, they realized net a larger sum than if they had safely reached their destination; but the freight upon them was wholly lost.¹

WATKIN WILLIAMS, J.,² delivered a written judgment to the following effect:—The action was brought by the plaintiffs, who are merchants in London, against the defendants, who are the owners of the ship *Attila*, to recover the net proceeds of certain cargo sold by them in a damaged state at a port of refuge. The defendants did not dispute their liability to account to the plaintiffs for the proceeds of the cargo, and they had in fact paid to the plaintiffs a large portion of the amount, but they claimed to be entitled to retain the amount now in dispute on account of a set-off or counter-claim for a general average contribution from the cargo for the loss of freight. [The learned judge set out the circumstances at length, and then proceeded.]

It seems to me that the only question in the case is whether the operation of pouring the water upon the coals under the above circumstances, and so rendering them unfit to be forwarded to their destination—causing a total loss of the freight to be earned by their delivery at their destination—can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average. In order to solve this question, it is necessary to consider what are the true principles upon which the right to a general average contribu-

¹Shortened statement substituted for that of the report.—Ed.

²A considerable portion of the learned judge's opinion is omitted.—Ed.

tion is founded. This right and its correlative obligation are not founded upon any contract, nor do they arise out of any relation created by contract between the parties: they spring from a rule of law applicable to all persons who chance to have interests on board of a ship at sea exposed to some common danger, threatening the safety of the whole. It is a law founded upon justice, public policy, and convenience, and rests, as Mr. Parsons says in his *Maritime Law*, vol. 1, p. 286, upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force. It formed part of the ancient marine law of Europe. It was incorporated into the Roman civil law from the code of Rhodes. This ancient code, which was the prevailing law at least a thousand years before the Christian era, is probably all lost with the exception of this one article, which is preserved in the Digest in the form of a rubric in the following terms: "*De lege Rhodiâ de jactu. Lege Rhodiâ cavetur, ut si levandæ navis gratiâ, jactus mercium factus est omnium contributione sarcietur, quod pro omnibus datum est.*" "Concerning the Rhodian law of jettison. By the Rhodian law care is taken that, if for the sake of lightening the ship, a jettison of merchandise is made, that which is given for all shall be made good by a contribution of all." This, says Parsons (*Maritime Law*, p. 286), is the foundation of the law of general average, and all besides this consists only of the rules which have been devised to carry this principle into its proper effect in the great variety of cases and through the many consequences which belong to its application. This principle of law must, in my judgment, be regarded as incorporated in and forming part of the unwritten common law of England. The principle is thus laid down by Malines in the "*Lex Mercatoria*," published in 1656, and Molloy in his work, "*De Jure Maritimo*," published in 1744: "Ships being freighted at sea are often subject to storms and other accidents in which, by the ancient laws and customs of the sea, in extreme necessity the goods, wares, guns, and whatsoever else shall be thought fit, may in such extremity be flung overboard. The ship arriving in safety, the remainder must come into the average, not only those goods which pay freight, but all those that have obtained safety and preservation by such ejection, even money, jewels, and such like are not exempted." And Molloy goes on to say that "King William the Conqueror and Henry I. ratified this law concerning goods cast overboard by mariners in a storm in imitation of the ancient Rhodian law '*De jactu.*'" This is confirmed also by Bracton, lib. 2, fol. 41, b. n. 3; also by Selden in his work "*De Dominio Maris*," chap. 24, p. 428. It is further confirmed by a statement in 1 Rymer *Fœdera*, 3rd ed. p. 240, that Edward I. in 1285 sent to the Cinque Ports letters patent declaring what goods were liable to contribution; yet this law does not appear in any statute or written ordinance of English law. Emerigon, in his famous treatise published in 1783, in writing upon

this subject, says: "The ancient laws of the sea are the sources whence those should draw who wish to recur to principles. These include rules so much the more sure that they are derived from the nature of things, and these rules form a part of the Law of Nations. They belong consequently to every age and every country." I consider, therefore, that, in solving the present question, which is stated never to have been before decided, I am bound to resort to the principles of the maritime law as expressed in the maxim from the code of Rhodes and as expounded in the various works of authority upon the subject.

There can be no doubt that, according to the universally accepted principles of general average, the following conditions must concur in order to give rise to a claim for contribution: 1. There must be a common danger. 2. There must be a necessity for the sacrifice. 3. The sacrifice must be voluntary. 4. It must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost and consequently of no value. 5. There must be a saving of the imperilled property through the sacrifice. The question in a case like the present arises from the necessity of drawing the line, marking the logical distinction between the necessity for the sacrifice on the one side, and the hopelessness of saving the sacrificed property on the other. Emerigon says, chap. xii. s. 29, "It is not enough that a jettison has been made; that measure must have been forced on those resorting to it by the fear of perishing, and a panic terror will not excuse the captain who has had recourse to jettison, without being forced to it by real danger." On the other hand, in a case in the American courts (*Crockett v. Dodge*, 3 Fair. 190), a vessel laden with lime was hauled out into the stream and scuttled because the lime was on fire. The lime was destroyed at once, and the ship was saved, but it was held that the ship did not contribute for the lime, because the lime could not possibly be preserved, and the ship was saved by only hastening its destruction. It has been decided in America in the case of *Nelson v. Belmont*, 5 Deuer, 310, and in the case of *Nimick v. Holmes*, 25 Pennsylv. 366, that where a cargo is on fire, and water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for. LOWRIE, J., in the latter case, said, the danger is a common one, and the cost of the remedy must be common. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest. In the case of *Stewart v. West India and Pacific Steamship Company (sup.)* in 1872, in which a quantity of bark had been injured by pouring water down the hold to extinguish an accidental fire, COCKBURN, C.J., and MELLOR and QUAIN, J.J., expressed their opinion that, according to the common law, the case was one of general average, but the parties having agreed that average was to be adjusted accord-

ing to British customs, and the case finding that it was the custom at Lloyd's not to treat such a loss as one of general average, the decision was necessarily against the claim. However, in a subsequent case in the year 1878 (*Achard v. Ring*, 31 L. T. Rep. N. S. 647), the existence of this custom was challenged, and, upon a trial before a special jury in London, the custom was negatived, and the principle of the common law and of the maritime law, as recognized by all commercial nations, was applied to the case, and the plaintiffs recovered a contribution in general average for damage done to their goods by the scuttling of the ship to extinguish a fire; and since that time this custom and practice has been discontinued and finally abandoned at Lloyd's. The still more recent case of *Attwood v. Sellar*, 41 L. T. Rep. N. S. 83; 4 Q. B. Div. 342, dealt a further blow to the supposed British customs and usages which were said to differ and distinguish the law of general average in England from that universally accepted; and it may now be considered as fairly established that this important branch of our commercial law is governed by the principles of the common law of England, embracing within it the principles of the general maritime law. Applying these principles to the facts of this case, I find that the ship and the whole adventure were in imminent danger of destruction from the fire which had broken out in one part of the cargo of coals; that it was prudent and necessary to throw over a portion of the coals to get at the seat of the fire, and to pour down water, both upon the burning coals and also upon all the rest of the coals, including those that were distant from the fire, as well as those adjoining it, for the purpose of arresting and extinguishing the fire and saving the ship and cargo; and also that all the operations were prudent and necessary with the same view, and that the water was poured down with this purpose and intention, and that the operation was successful in saving the ship and a very large portion of the cargo; and, further, that the operation involved a voluntary sacrifice for the benefit and safety of the adventure of a certain portion of the freight, viz., so much as related to cargo damaged by water, and not within the immediate reach of the fire, and which was too much damaged by water to be forwarded to its destination so as to earn freight. These conclusions, upon the principles above stated, establish the claim of the owners of the freight to a contribution in general average from the owners of the other interests, and entitle the defendants to judgment.

IN *Ralli v. Troop* (1894) 157 U. S. 386, 393-397,¹ Mr. Justice GRAY, speaking for the court, said:

The law of general average, coming down to us from remote

¹For a learned criticism of this case, see an article on General Average, by the late Judge LOWELL, in 9 Harv. Law. Rev. 185-197.—ED.

antiquity, is derived from the law of Rhodes, through the law of Rome, and is part of the maritime law, or law of the sea, as distinguished from the municipal law, or law of the land.

The typical case is that mentioned in the Rhodian law preserved in the Pandects of Justinian, by which, if a jettison of goods is made in order to lighten a ship, what is given for the benefit of all is to be made good by the contribution of all. *Cavetur ut, si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.* Dig. 14, 2, 1, 1.

Another case of general average, put in the Pandects, and the only one, beside jettison, mentioned in the Judgments of Oleron, or in the Laws of Wisby, is the cutting away of a mast to save ship and cargo. Dig. 14, 2, 1, 4; Oleron, arts. 8, 9; Wisby, arts. 7, 11, 14.

The distinction between voluntary and compulsory sacrifice is well illustrated by another case stated in the Pandects, recognized in the earliest English case on general average, and approved in all the books, in which money voluntarily paid by the master to ransom the ship and cargo from pirates is to be contributed for; but not so, as to goods or money forcibly taken by pirates. Dig. 14, 2, 1, 5; *Hicks v. Palington* (32 Eliz.) Moore, 297.

In the courts of England and America, general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; but it has never been extended beyond the spirit and principle of those laws.

In the earliest case in this court, Mr. Justice STORY, in delivering judgment, stated the leading limitations and conditions, as recognized by all maritime nations, to justify a general contribution, as follows: "First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained." *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, 338.

In the next case which came before this court, Mr. Justice GRIER, in delivering judgment, defined these requisites, somewhat more fully, as follows: "In order to constitute a case of general average, three things must concur: 1st. A common danger, a danger in which ship, cargo and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2d. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril. *periculi imminetis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3d. This attempt to avoid the imminent peril must be successful." *Barnard v. Adams*, 10 How. 270, 303.

There has been much discussion in the books as to whether the right

to a general average contribution rests upon natural justice, or upon an implied contract, or upon a rule of the maritime law, known to and binding upon all owners of ships and cargoes. But the difference has been rather as to forms of expression, than as to substantial principles or legal results.

Mr. Justice CLIFFORD, speaking for this court, stated, in several cases, as the basis of general average, that natural justice requires that where two or more parties are engaged in a common sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure. *McAndrews v. Thatcher*, 3 Wall. 348, 366; *The Star of Hope*, 9 Wall. 203, 228; *Fowler v. Rathbones*, 12 Wall. 102, 114; *Hobson v. Lord*, 92 U. S. 397, 404. That the doctrine applies only where something, which is part of the common adventure, is sacrificed solely for the benefit of the rest of the adventure, is apparent in those cases. In *McAndrews v. Thatcher*, it was held that there could be no contribution for expenses incurred after the master had abandoned the stranded ship, and had left her in charge of the agent of her underwriters; because, as the court said: "Complete separation had taken place between the cargo and the ship; and the ship was no longer bound to the cargo, nor the cargo to the ship. Undoubtedly the doctrine of general average contribution is deeply founded in the principles of equity and natural justice; but it is not believed that any decided case can be found, where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs." 3 Wall. 372. In *The Star of Hope*, and in *Fowler v. Rathbones*, the general average allowed was for the loss of the vessel by stranding by the voluntary act of the master. See *Emery v. Huntington*, 109 Mass. 431, 436. And in *Hobson v. Lord*, the contribution allowed was for wages and provisions of the crew while assisting in repairing the injuries suffered by the vessel from such a stranding.

In *Wright v. Marwood*, in which it was held by the English Court of Appeal that a jettison, by the master, of cattle carried on deck, though proper and necessary for the safety of the ship, did not give a right to general average, Lord Justice BRAMWELL said: "It is not necessary to say what is the origin or principle of the rule; but, to judge from the way it is claimed in England, it would seem to arise from an implied contract *inter se* to contribute 'by those interested.'" The judgment, however, was put upon the ground that, whether the rule was treated as arising from implied contract, or as a matter of positive law, it was subject to an exception in the case of goods loaded on deck, unless a deck cargo was customary. 7 Q. B. D. 62, 67.

In *Burton v. English*, in the same court, in which the charter-

party stipulated that the ship should be "provided with a deck load, if required, at full freight, but at merchant's risk," and the last words were held not to exclude the right to a general average contribution for a necessary jettison of timber carried on deck, Lord Justice BRETT (since Lord ESHER, Master of the Rolls), in answering the question, "By what law does the right arise to general average contribution?" said: "I do not think that it forms any part of the contract to carry; and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charter-party on which the defendants rely." 12 Q. B. D. 218, 220, 221.

In the same case, Lord Justice BOWEN, with characteristic clearness and felicity of expression, said of the same question: "In the investigation of legal principles, the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may, if you like, imagine that those who place their property on board a ship on the one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent, not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest." 12 Q. B. D. 223.

As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures, so the authority of the master may be treated

as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care.

FORD v. STOBRIDGE.

IN CHANCERY, BEFORE LORD COVENTRY, 1632.

[*Nelson, Chancery, 24.*]

THE plaintiff was bound as surety for the defendant, and the debt was recovered against him, and he, having no counter-bond, brought his bill to recover the debt and damage against the defendant, which was decreed accordingly. *Quod nota.*¹

SCOTT v. STEPHENSON.

MICHAELMAS. KING'S BENCH, 1662.

[1 *Levinz, 71.*²]

ASSUMPSIT, that whereas Sanders was indebted to divers persons, and the plaintiff obliged for him, and forced to pay them; the defendant being Sanders's executor, in consideration the plaintiff would forbear to sue him for the money, promised to pay him. After a verdict for the plaintiff on the issue *non assumpsit*, it was moved in arrest of judgment, that here was no consideration; for it does not appear that Sanders had promised or was obliged to save him harmless; and Borden and Thyn's case in Yelverton, 40, and Smith and John's case, Owen, 132, were cited. But by the court there was equity, that Sanders should save the plaintiff harmless, and a suit in equity is a suit, or perhaps he might be charged by (a writ) *de plegiis acquietandis*, and therefore they held the consideration good, and gave judgment for the plaintiff, except cause (shown to the contrary) on Monday next, &c.

¹The editor has not cared to glean stubble after Mr. Ames' rich harvest in the field of suretyship. Therefore, the cases involving the obligation in suretyship, as well as the notes thereto, are taken mostly from his collection.

As in the case of general average, no attempt has been made to exhaust the subject or, indeed, to develop it. The cases are chosen solely to show the quasi-contractual nature of the obligation.—ED.

²Likewise reported in 1 Sid. 89, 1 Keb. 346.—ED.

LAYER v. NELSON.

IN CHANCERY, BEFORE LORD JEFFREYS, 1687.

[1 *Vernon*, 456.]

WHERE one obligee that is a surety is sued alone, by the custom of the city of London he shall make his co-sureties contribute: so where a surety pays a debt, and has no counter-bond, by the custom of the city of London he shall maintain an action against the principal.

DECKER v. POPE.

NISI PRIUS, BEFORE LORD MANSFIELD, C. J., 1757.

[1 *Selwyn*, *Nisi Prius* (13th ed.), 91.]

THIS was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant; and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use.

Lord MANSFIELD directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.¹

¹In 1821 Lord ELDON said: "Until I became acquainted with that case [*Toussaint v. Martinnant* (1787), 2 T. R. 100], I thought the remedy must be in equity." *Stirling v. Forrester*, 3 Bligh, 575, 590.

"If the surety, at the time of entering into the suretyship obligation, take a counterbond of indemnity from the principal, his only remedy at common law is upon the counterbond. The express contract excludes any implied promise of indemnity. *Toussaint v. Martinnant* (1787) 2 T. R. 100; *Roosevelt v. Mark* (1822) 6 Johns. Ch. 266"—ED.

APPLETON v. BASCOM.

SUPREME JUDICIAL COURT, MASSACHUSETTS, 1841.

[3 *Metcalf*, 169.]

THIS was an action of debt on a bond for the liberty of the prison limits, and was submitted to the court on the following facts: Timothy Bascom, one of the defendants, was administrator of the estate of Clement Bascom, and the plaintiffs were his sureties on his administration bond, which they executed with him on the 3d of November, 1835. On the 21st of April, 1840, the plaintiffs jointly paid \$230 for said Timothy's default, which they were bound to pay by reason of having been his sureties on said bond.

At the December term, 1840, of the Court of Common Pleas, the plaintiffs recovered judgment against said Timothy, in an action for money paid, the amount which they had paid, as aforesaid, by reason of his default. In that action, they filed a specification of their claim, setting forth that they demanded \$230 paid by them on account of their having signed a bond as sureties of the said Timothy as administrator of Clement Bascom. Execution issued on said judgment, and said Timothy was committed to the jail at Lowell, on the 23d of February, 1841, and on the same day he, and the other defendants, as his sureties, executed the bond on which the present action was brought. Immediately after the execution of the bond, said Timothy went without the exterior limits of the city of Lowell, without the consent of the plaintiffs, and without being discharged by law. He afterward took the poor debtor's oath.¹

WILDE, J. This is an action of debt on a bond given for the liberty of the prison limits, and the question is, whether the principal in the bond, after the giving of said bond, committed an escape by going without the prison limits. And this depends on ascertaining the time when the contract was made, on which the judgment was recovered, upon which the execution issued, by virtue of which the said principal in the bond was committed to prison. The said judgment was recovered in an action for money paid by the plaintiffs, and which they were obliged to pay, for said principal, by reason of his breach of the condition of an administration bond, which they had executed as his sureties.

The action was founded on an implied promise; and the question is reduced to this, whether the promise was implied by law at the

¹The arguments of counsel are omitted.—ED.

time when the plaintiffs became sureties, or not until they paid the money, when their right of action against the defendant first accrued. And we think it is well settled, that when a surety becomes bound for his principal and at his request, the law implies a promise of indemnity by the principal to the surety to repay the latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. So the law is laid down in *Wood v. Leland*, 1 Met. 389; and so it was decided in *Gibbs v. Bryant*, 1 Pick. 121, in *Toussaint v. Martinnant*, 2 T. R. 104, in *Howe v. Ward*, 4 Greenl. 200, and in many other cases. In *Gibbs v. Bryant* there had been given a written promise of indemnity, and the court say that "the written contract produced contained nothing more than what the law would imply." And so the law has been well settled for a long time, although in ancient times no action at law could be maintained where a surety had paid the debt of his principal; the only remedy being to be had in a court of equity. But very many equity principles have been adopted by courts of law in modern times, allowing actions to be maintained on implied promises by the party to do what justice and equity require to be done, where there is no express contract. And the implied promise of indemnity in the present case must be considered as made at the time when the plaintiffs became responsible to the creditor on the bond. The plaintiffs' liability was the consideration of the principal's implied promise of indemnity, and the promise must be considered as made at the time when that liability was assumed. And the plaintiffs, when they paid the money, might have declared on said implied promise, or for money paid, in common form, as the declaration was. The time of making the contract is not to be determined by the form of the action.

The other objection made by the defendants' counsel is, that the law does not imply a promise to the plaintiff jointly; and the case of *Gould v. Gould*, 8 Cow. 168, seems to countenance this objection. But a more reasonable doctrine is maintained in other cases. *Osborne v. Harper*, 5 East. 225; *Pearson v. Parker*, 3 N. H. 366; *Jewett v. Cornforth*, 3 Greenl. 107. According to the decisions in these cases, when money is paid by two or more sureties jointly for the principal, or when the money paid is raised on their joint credit, their proper remedy for reimbursement is a joint action;¹ but if they pay separately, then their proper remedy is by separate action, and

¹Accord: *Osborne v. Harper*, 5 East. 225; *Dussol v. Brugniere*, 50 Cal. 456; *Hull v. Myers*, 90 Ga. 675, 686 (*semble*); *Jewett v. Cornforth*, 3 Me. 107; *Lombard v. Cobb*, 14 Me. 222, 224 (*semble*); *Clapp v. Rice*, 15 Gray, 557; *Pearson v. Parker*, 3 N. H. 366; *Commonw. v. Cox*, 36 Pa. 442.

"Contra: *Kelby v. Steel*, 5 Esp. 194; *Gould v. Gould*, 8 Cow. 168.

"But one who pays jointly with others may sue alone for contribution from a co-surety who has not paid. *Hull v. Myers*, 90 Ga. 675; *Atkinson v. Thayer*, 2 B. Mon. 348."—ED.

a joint action cannot be maintained.¹ In either case, however, the action, whether joint or several, is founded on the promise of indemnity expressly or impliedly made at the time when the sureties first became bound. When a promise is implied by law, such a promise is implied as will give to the party who may suffer damage by the breach of it a suitable and proper remedy. We consider, therefore, the promise of Bascom, to indemnify his sureties, as made to them jointly and severally; and as it appears that they paid the money, which they became liable to pay, jointly, they were well entitled to a joint action against him for reimbursement.

*Judgment for the plaintiffs.*²

WORMLEIGHTON v. HUNTER'S CASE.

COMMON PLEAS, 1613

[*Godbolt*, 243.]

Two men are bounden with J. S. as sureties in an obligation. One of the sureties, viz. Wormleighton, was sued upon the bond, and the whole penalty recovered against him. He exhibited an English bill into the Court of Requests against the defendant, being the other surety, to have contribution: and it was moved to the Court for a prohibition to the Court of Requests, and the same was granted,

¹"Accord: *Graham v. Robertson*, 2 T. R. 282; *Brand v. Boulcott*, 3 B. & P. 235; *Lombard v. Cobb*, 14 Me. 222; *Prescott v. Newell*, 39 Vt. 82.

"But the paying sureties may join as plaintiffs in a suit in equity for contribution against those who have not paid. *Smith v. Rumsey*, 33 Mich. 183; *Young v. Lyons*, 8 Gill, 162; *Fletcher v. Jackson*, 23 Vt. 581."—ED.

²"Accord: *Rice v. Southgate*, 16 Gray. 142; *Elwood v. Deifendorf*, 5 Barb. 398.

"Similarly a surety is creditor of principal within Statute of Elizabeth as to conveyances in fraud of creditors from the time he becomes surety. *Keel v. Larkin*, 72 Ala. 493; *Bragg v. Patterson*, 85 Ala. 233; *Choteau v. Jones*, 11 Ill. 300; *Hatfield v. Merod*, 82 Ill. 113; *Sargent v. Salmond*, 29 Me. 539; *Williams v. Banks*, 11 Md. 198, 242; *Pennington v. Seal*, 49 Miss. 518, 525; *Loughridge v. Bowland*, 52 Miss. 546; *Carlisle v. Rich*, 8 N. H. 44 (*semble*). But see *contra*, *Williams v. Tipton*, 5 Humph. 66.

"So, also, if a testator is a co-surety with one of his legatees, and the latter assigns his legacy before the estate of the testator pays the creditor, the assignee takes subject to the right of the estate to reduce the legacy by the amount due from the legatee by way of contribution, for the equity to make this reduction arose contingently when the relation of suretyship was assumed by the parties. *Baily's Est.* 156 Pa. 634."—ED.

because by entering into the obligation it became the debt of each of them jointly and severally, and the obligee had his election to sue which of them he pleased and take forth execution against him: and the Court said, that if one surety should have contribution against the other, it would be a great cause of suits, and therefore the prohibition was awarded; and so it was said it was lately adjudged and granted in the like case, in Sir William Whorwood's case.

FLEETWOOD v. CHARNOCK.

IN CHANCERY, BEFORE LORD COVENTRY, 1629.

[*Nelson*, 10.¹]

THE plaintiff and defendant were jointly bound for a third person, who died leaving no estate; the plaintiff was sued and paid the debt and brought his bill against the defendant for contribution, who was decreed to pay his proportionate part.²

SIR E. DEERING v. THE EARL OF WINCHELSEA
AND OTHERS.

IN THE EXCHEQUER, FEBRUARY 8, 1787.

[2 *Bosanquet & Puller*, 270.³]

LORD CHIEF BARON EYRE (present HOTHAM and PERRIN, Barons) delivered the opinion of the Court.

Thomas Deering, younger brother of the plaintiff, was appointed in 1778 receiver of fines and forfeitures of the customs of the out-ports, and entered into three bonds, each in the penalty of £4,000. with condition for duly accounting; in one of which the plaintiff joined as surety, in another Lord Winchelsea, and Sir John Rous in the third. Thomas Deering became insolvent and left the country: the balance due to the crown was £6,602 10s. 8d., part of which was levied on his effects, and when the bill was filed there was due £3,883 14s. 8½d., which was rather less than the penalty of each of the bonds. The bond in which the plaintiff had joined was put in

¹Reported also in Tothill, 41.—Ed.

²“*Parkhurst v. Bathurst*. Contribution of a bond in Mich. or Hillar, 5 Car. —; *Wilcox v. Lord Dunsmore*. A demurrer put in upon point of contribution overruled, 12 Car.’ Toth. 41.”—Ed.

³Also reported in 1 Cox, 319.—Ed.

suit against him, and judgment obtained. He filed his bill demanding contribution against Lord Winchelsea and Sir John Rous, and praying an account of what was due to the crown and money levied on the plaintiff (supposing execution to follow the judgment), and that Lord Winchelsea and Sir John Rous might contribute to discharge the debt of Thomas Deering as two of the sureties for that debt. The appointment, the three bonds, and the judgment against the plaintiff were in proof, and the balances were admitted by all parties.

The Lord Chief Baron, after stating the case, observed, that contribution was resisted on two grounds: first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the defendants considering the title to contribution as arising from contract expressed or implied; secondly, that the conduct of Sir Edward Deering had deprived him of the benefit of any equity which he might have otherwise had against the defendants.

The Lord Chief Baron considered the second objection first. The misconduct imputed to Sir E. Deering was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances and faithfully account to the crown; that Sir E. Deering was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His Lordship observed that this might be true, and certainly put Sir E. Deering in a point of view which made his demand indecorous; but it had not been made out to the satisfaction of the Court that this constituted a defence. Mr. Maddocks had stated that the author of the loss should not have contribution; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the plaintiff to support his demand, it must be on the maxim, "that a man must come into a court of equity with clean hands;" but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a *legal* sense the cause of the loss. In a *moral* sense Sir E. Deering might be the author of the loss; but in a *legal* sense Thomas Deering was the author; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of. There might indeed be a case in which a person might be in a *legal* sense the author of the loss, and therefore not entitled to contribution: as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act it became necessary to throw overboard his goods to save the ship. This head of defence therefore fails. The real point is, Whether there shall be contribution by sureties in distinct obligations?

It is admitted, that if they had all joined in one bond for £12,000,

there must have been contribution. But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety on the face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. Contract indeed may qualify it, as in *Swain v. Wall*, where three were bound for H. in an obligation, and agreed, if H. failed, to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only.

There are in the Register, fo. 176 *b*, two writs of contribution, one, "*De contributione facienda inter cohæredes*," the other, "*De feoffamento*;" these are founded on the Statute of Marlebridge, 52 H. III., c. 9, which enacts, "That if any inheritance whereof but one suit is due descends unto many heirs as unto parceners, whoso hath the eldest part of the inheritance, shall do that one suit for himself and fellows, and the other co-heirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seised of an inheritance whereof but one suit is due, the lord of the fee shall have but that one suit, and shall not exact of the said inheritance but that one suit, as has been used to be done before. And if these feoffees have no warrant or means which ought to acquit them, then all the feoffees according to their portion shall be contributaries for doing the suit for them." The object of the statute was to protect the inheritance for more than one suit. The provision for contribution was an application of a principle of justice. In *Fitzh. N. B.* 162 *B*, there is a writ of contribution where there are tenants in common of a mill and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page Fitzherbert takes notice of the writs of contribution between co-heirs and co-feoffees; and supposes that between feoffees the writ cannot be had without the agreement of all, and the writ in the register countenances the idea; yet this seems contrary to the express provision in the statute. In *Sir Wm. Harbet's Case*, 3 Co. 11 *b*, many cases are put of contribution at common law. The reason is, they are all *in æquali jure*, and as the law requires equality they shall equally bear the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law. In *Equity Cases Abridged* there is a string under the title "Contribution and Average." Another case at

law occurred in looking into Hargrave's Tracts in a treatise ascribed to Lord Hale on the prisage of wines. The king's title is to one ton before the mast and one ton behind the mast. If there are different owners they may be compelled in the Exchequer Chamber to contribute. Contribution was considered as following the *accident* on a general principle of equity in the court in which we are now sitting.

In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectually *quoad* contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally.

In this case Sir E. Deering, Lord Winchelsea, and Sir J. Rous were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are *in æquali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel. Show. Parl. Cas. 19 Moor, 297. The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions.

The decree pronounced was, that it being admitted by the Attorney-General and all parties that the balance due was £3,883 14s. 8½d., the plaintiff Sir E. Deering, and the defendants the Earl of Winchelsea and Sir J. Rous, ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each £1,294 11s. 6½d., and on payment the Attorney-General to acknowledge satisfaction on the record of the judgment against the plaintiff, and the two bonds

entered into by the Earl of Winchelsea and Sir J. Rous to be delivered up.

This being a case which the Court considered as not favorable to Sir E. Deering and a case of difficulty, they did not think fit to give him costs.¹

BACHELDER v. FISK AND ANOTHER, EXECUTORS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1821.

[17 *Massachusetts*, 464.]

THE action was commenced on the 30th of August 1820, and was submitted to the decision of the court upon an agreed statement of facts, to the following purport.—*Ebenezer Fiske*, one of the defendants, was duly appointed guardian, as alleged in the declaration, on the 4th of October 1813. The plaintiff and the testator then gave bond to the judge of probate for this county in the penalty of 10,000 dollars, as sureties for the said *Ebenezer's* performance of his said trust. In June 1820 the said *Elbridge* came of age, and demanded of the said guardian an account of his trust. The guardian was insolvent, and the ward then required the plaintiff to pay him 4197 dollars 71 cents, then remaining due to him from the guardian; which sum the plaintiff, on the 25th of August 1820, paid to the ward, in pursuance of the said bond.

The said guardian made an assignment of certain property to the plaintiff, for the purpose of indemnifying him against his liability as surety in the said bond.

¹Whiting v. Burke, 6 Ch. 342, 10 Eq. 539; *In re Ennis* (1893) 3 Ch. 238; Dugger v. Wright, 51 Ark. 232; Powell v. Powell, 48 Cal. 234; Monson v. Drakeley, 40 Conn. 552; Stevens v. Tucker, 87 Ind. 109; Hutehcraft v. Shrout, 1 T. B. Mon. 208; Breckenridge v. Taylor, 5 Dana, 110; Bosley v. Taylor, 5 Dana, 157; Cobb v. Harries, 8 B. Mon. 137; Stockmeyer v. Oertling, 35 La. An. 468; Chaffee v. Jones, 19 Pick. 260; Craig v. Ankeney, 4 Gill, 225; Loring v. Bacon, 3 Cush. 465; Brooks v. Whitmore, 142 Mass. 399; Forbes v. Harrington, 171 Mass. 386; Young v. Shunk, 30 Minn. 503; Wood v. Williams, 61 Mo. 63; Norton v. Coons, 3 Den. 130; Aspinwall v. Torrance, 57 N. Y. 331; Armitage v. Pulver, 37 N. Y. 494; Schram v. Werner, 85 Hun. 293; Oats v. Bryan, 3 Dev. 451; Bell v. Jasper, 2 Ired. Eq. 597; Jones v. Hayes, 3 Ired. Eq. 502; Jones v. Blanton, 6 Ired. Eq. 115; Moore v. Boudinot, 64 N. Ca. 190; Cherry v. Ross, 78 N. Ca. 164; Hughes v. Boone, 81 N. Ca. 204; Pickens v. Miller, 83 N. Ca. 543; Robinson v. Boyd, 60 Oh. St. 57; Durbin v. Kuney, 19 Oreg. 71; Thompson v. Dekum, 32 Oreg. 506; Commw. v. Cox, 36 Pa. 442; Harris v. Ferguson, 2 Bail. 397; Enicks v. Powell, 2 Strob. Eq. 196; Odom v. Owens, 2 Baxt. 446."

And see the elaborate note on this case in 2 White & Tudor's Equity Cases (7th ed.) 540, *et seq.*—Ed.

The defendant's testator died on the 9th of April 1815, leaving real and personal estate appraised at 3965 dollars.

The plaintiff set out these facts in a special count, and also filed the common money counts *pro forma*.

If, upon the facts stated, the court should be of opinion that the plaintiff was entitled to recover in this action the amount of damages was to be assessed by a jury; if otherwise, the defendants were to recover costs.¹

JACKSON J. delivered the opinion of the court.

As to the main question in this case, it has been long settled in our courts that a surety, who has paid the debt of the principal, may have an action for contribution against his co-surety: and the common form of the action here, as well as in the *English* courts, has been *indebitatus assumpsit* for money paid by the plaintiff for the use of the defendant, 2 B. & P. 268, Cowell, adm. v. Edwards. It is true that, in the case of *Deering v. The Earl of Winchelsea & al.* 2 B. & P. 270, it is said that this right of contribution is not founded on contract, but on "a fixed principle of justice;" and it is likened to the case of contribution to a general average, when part of a cargo is thrown overboard at sea to save the residue; in which case it is said, "there is no contract express or implied, nor any privity in an ordinary sense." But it has been deliberately decided in *Birkley & al. v. Presgrave*, 1 East, 220, that *assumpsit* will lie for contribution in this latter case; and every reason there given applies with equal force in support of the action of *assumpsit* by one co-surety against another. Accordingly in the case before cited of *Cowell v. Edwards*, the court seem to think it settled, that *assumpsit* will lie for the co-surety in such a case; and, as was before observed, the action in that form has been uniformly maintained in our courts. Indeed it is difficult to conceive of a right in one party founded on "the fixed principles of justice," and recognized by the law of the land, which does not involve a corresponding obligation on the other party: and a legal obligation is a sufficient ground of an implied promise. We are therefore satisfied, both on principle and authority, that *assumpsit* will lie on an implied promise by one surety, to contribute towards indemnifying another.

But there is a technical objection, in the present case, to the usual form of declaring; inasmuch as the plaintiff cannot allege that he paid the money for the use of the co-surety, after the death of the latter: and if he alleges that he paid it for the use of the defendant as executors, it would be to charge the defendants in their own right, which cannot be done.

This objection is answered by the general principle, which is uni-

¹Statement of facts is much abridged, and a portion of the opinion of the court is omitted.—ED.

versally recognized; and which was applied in the case before cited from 1 East 220, that when the law confers a right, it will also confer a remedy. That case also furnishes an authority, if any were wanted, as to the form of declaring. The declaration there contained the usual money counts; but it also contained a special count, setting forth all the facts on which the implied promise of the defendant was founded; and that count is particularly noticed by the court, as exhibiting the grounds and nature of the action.

The actions of *assumpsit* in most common use seem to have acquired, in some measure, the character of the ancient formed actions of the common law: but they are still only actions on the case, in which the plaintiff, whenever he finds it necessary or useful, may set out *his whole case*; and if that shews a valid legal promise by the defendant, whether express or implied, it is sufficient. Now it is obvious that the same facts, which, when proved on a trial, would support the common count for money paid by the plaintiff, would have the like effect when disclosed in a declaration, and proved in like manner.

We are therefore satisfied that the plaintiff may recover in this case on a special count, setting forth all the material facts, and alleging the liability of his co-surety, and his promise accordingly, to pay to the plaintiff one moiety of what he should be compelled to pay for the principal. It is not usual, on an agreed statement of facts, to examine the form of the declaration very critically; and we have not done it in this case. The facts stated exhibit a sufficient ground of action, and the declaration may be made conformable to them, if it is not already so.

As to the assignment of property, from the principal to the plaintiff, for the purpose of indemnifying him, his co-surety would have had reason to complain, if he had not done it when in his power. That assignment inures to the benefit of both the sureties: and if the plaintiff has received any money from that source, it must be deducted from the amount he has paid; and the defendants will be liable for half the balance only. If the plaintiff, after recovering what he is entitled to in this action, should receive any further payment from the principal, either out of the property so assigned or in any other way, he must account with the defendants for a moiety of it.¹

¹Accord: *Warner v. Morrison* (1862) 3 Allen, 566; *Weeks v. Parsons* (1900) 176 Mass. 570; *Bradley v. Burwell* (1846) 3 Den. 61; *Tom v. Goodrich* (1807) 2 Johns. 213.—ED.

DAVIES v. HUMPHREYS.

EXCHEQUER, 1840.

[6 Meeson & Welsby, 153.]

PARKE, B.¹ In these cases actions were brought by the plaintiff, one of the makers of a joint and several promissory notes, dated the 27th of December, 1827, for the sum of £300, with interest, to recover from the two other makers, Evan Humphreys and John Humphreys, a part of the money paid by him to the payee, he having paid the whole. In the action against Evan Humphreys, the plaintiff claimed the whole, alleging that the defendant was the principal debtor. Against the defendant John Humphreys, he claimed a moiety of what he had paid, alleging that the defendant was a co-surety. There were two pleas,—*non assumpsit*, and the Statute of Limitations; and on the trial at the Spring Assizes, before my Brother COLERIDGE, it appeared that the plaintiff had paid the whole of the debt and interest, of which the sum of £30 only was paid within six years before the commencement of the suit, the residue having been discharged before. For this sum the plaintiff recovered against Evan Humphreys, leave being reserved by the learned judge to move to increase the amount of the whole sum paid; against John Humphreys, the plaintiff recovered a moiety of £30, and permission was also given to move to increase that verdict.

The rule for increasing the amount of the verdict against Evan Humphreys, the principal, must be discharged; for it is clear that each sum the plaintiff, the surety, paid, was paid in ease of the principal, and ought to have been paid in the first instance by him, and that the plaintiff had a right of action against him the instant he paid it, for so much money paid to his use. However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement. The consequence is, that the plaintiff's right of action against the principal must be limited to the full amount of all the payments within six years, and this being the amount for which the verdict was taken, the rule to enter a verdict for a larger sum must be discharged. Against the co-surety the case is different—the Court will give it further consideration.

And now, in this term, the judgment of the Court, on the remaining point in the action against John Humphreys, the surety, was delivered by

PARKE, B. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the sittings after Trinity Term. In the course of the last

¹Only a portion of the opinion of the Court is given.—ED.

term, the Court disposed of the rule in the latter action, and one of the questions is this; having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Cowell v. Edwards* and *Craythorne v. Swinburne*; though Lord ELDON has, and not without reason, intimated some regret that the courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What, then, is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favor of the second of these propositions. Lord ELTON, in the case of *Ex parte Gifford*, states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, *that if one pays more than his proportion*, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay; and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable; for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt: in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he had no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his

proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

*Rules accordingly.*¹

BATARD v. HAWES.

QUEEN'S BENCH, 1853.

[2 *Ellis & Blackburn*, 287.]

LORD CAMPBELL, C. J., in this term (May 31st), delivered the judgment of the Court.²

It appeared in this case that the plaintiff, the defendant, and several other persons, had jointly employed Mr. Baley, an engineer, to make plans and sections, and to do engineering work, preparatory to bringing a bill for a railway before Parliament. The plaintiff was sued by Baley for the amount of his bill, and was obliged to pay him; and he then brought the present action, to recover from the defendant his share of contribution.

The jury found, at the trial, that there were twelve persons, including the plaintiff and the defendant, who were parties to the original

¹Accord: "*Ex parte* Snowdon, 17 Ch. D. 44; *Preslar v. Stallworth*, 37 Ala. 402, 405; *Sherwood v. Dunbar*, 6 Cal. 53; *Richter v. Henning*, 110 Cal. 530; *Lytle v. Pope*, 11 B. Mon. 297, 307; *Robinson v. Jennings*, 7 Bush, 630; *Hooper v. Hooper*, 81 Md. 155, 174; *Pass v. Grenada*, 71 Miss. 426; *Singleton v. Townsend*, 45 Mo. 379; *Magruder v. Admire*, 4 Mo. Ap. 133; *Sherwood v. Woodard*, 4 Dev. 360; *Leek v. Covington*, 99 N. Ca. 559; *Durkin v. Kuney*, 19 Oreg. 71; *Mateer v. Cockrill* (Texas Civ. Ap. 1898), 45 S. W. R. 751; *Bushnell v. Bushnell*, 77 Wis. 435.

"The surety's right to contribution is complete upon payment without notice to the co-surety of the payment or demand of repayment of the contributive

²Only the opinion of the Court is given.—Ed.

employment of and contract with Baley; and that two of those persons had died before the payment by the plaintiff to Baley. The defendant had paid into court an amount sufficient to cover one-twelfth of the amount of the payment to Baley, but not sufficient to cover one-tenth of that amount. And the question thus arose for our consideration, whether the amount to be recovered by the plaintiff under the above circumstances was to be calculated according to the number of original joint contractors, or according to the number of those who were alive when the payment was made, and against whom the right of the creditor to sue at law had survived. The point appeared to us to be one which would admit of considerable doubt; and we took time to consider our judgment.

If the right of contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability. we should have to look to the number of co-contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into. To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either expressed or implied by law. When one party enters into a legal liability for and at the request of another, a request to pay the money is implied by law from the fact of entering into the engagement; and, if the debt or liability is incurred entirely for a principal, the surety, being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so. In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each co-contractor ought to pay as between themselves; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the

share. *Taylor v. Reynolds*, 53 Cal. 686; *Ward v. Henry*, 5 Conn. 595; *Wood v. Perry*, 9 Iowa, 479; *Morrison v. Poyntz*, 7 Dana, 307; *Chaffee v. Jones*, 19 Pick. 260; *Vliet v. Wyckoff*, 42 N. J. Eq. 644; *Sherrod v. Woodward*, 4 Dev. 360; *Parham v. Green*, 64 N. Ca. 436; *Bright v. Lennon*, 83 N. Ca. 133; *Cage v. Foster*, 5 Yerg. 261 (principal being insolvent); *Foster v. Johnson*, 5 Vt. 60; *Mason v. Pierson*, 69 Wis. 585. Accord.

"*Williams v. Williams*, 5 Oh. 444; *Carpenter v. Kelley*, 9 Oh. 106; *Neilson v. Fry*, 16 Oh. St. 552, contra."

And see, also, *Pitt v. Purssord* (1841) 8 M. & W. 538; *Kemp v. Finden* (1844) 12 M. & W. 421; *Gospel v. Swinden* (1844) 1 Dow & L. 888; *Reynolds v. Wheeler* (1861) 10 C. B. (N. S.) 561; *Thayer v. Daniels* (1872) 110 Mass. 345.—Ed.

request of such co-contractor; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement. If the original arrangement was inconsistent with the fact that each was to pay his share, no action for such contribution could be maintained. Thus, if, by arrangement between ourselves, one of the joint contractors, though liable to the creditor, was not to be liable to pay any portion of the debt, it is clear that no action could be maintained against him; though, if the relief from the legal liability were alone looked to, it would follow that he was liable to contribute. So, where one surety enters into an engagement of suretyship at the request of his co-surety, it has been held that the co-surety, paying the whole, can maintain no action. *Turner v. Davies*.

Our opinion is in conformity with the cases in which it has been held that a co-surety is not liable at law to a greater extent than his share, with reference to the original number of sureties, notwithstanding the insolvency of one or more of the co-contractors; and also agrees with the rule laid down by Mr. Justice BAYLEY, in *Browne v. Lee*, 6 B. & C. 697, where he says: "I think that at law one of three co-sureties can only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of sureties"

It was urged before us, by Mr. Bramwell, that if there were an implied original arrangement between the co-contractors, an action ought to be maintainable on such promise against the executors of a deceased co-contractor; and he said that there being no instance of such an action went strongly to show that there was no such original engagement. It might be said, on the other hand, that there is no instance in the books of the party who has paid recovering more than an aliquot proportion with reference to the original number of co-contractors, by reason of the death of one or more of them. But it is a more satisfactory answer, that there is very strong authority for holding that such an action will lie against executors.

In *Ashby v. Ashby*, 7 B. & C. 444, those very learned judges Mr. Justice BAYLEY and Mr. Justice LITTLEDALE rely on such an action lying against executors as the ground of their judgments on the point directly before them. Mr. Justice BAYLEY says (7 B. & C. 449): "To put a plain case, suppose two persons are jointly bound as sureties, one dies, the survivor is sued and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid, and I think he is entitled to sue the executor of the deceased for money paid to his use as executor." And Mr. Justice LITTLEDALE says (7 B. & C. 451): "Suppose that a plaintiff had become bound jointly with a testator, and after his death had paid the whole debt; I should think that

an action against the executor for money paid to his use might be supported, and that the plaintiff would be entitled to judgment *de bonis testatoris*." See also 2 Williams on Executors, 1st edit. 1088.¹ Such an action against executors can only be supported on the ground of the existence of such an implied original engagement as we have adverted to, which, being made in the testator's time, would bind the executors; and such an engagement, if implied, would form a good legal ground for supporting the action of money paid.

We were pressed also with the *dictum* of Lord ELDON in *Craythorne v. Swinburne*, referred to by PARKE, B., in *Kemp v. Finden*, 12 M. & W. 421, 424, and in *Davies v. Humphreys*, as to the action of contribution being founded rather upon a principle of equity than upon contract. The expressions of Lord ELDON, however, will be found to relate rather to the origin of the implied contract than to the time at which it is to be taken to be made. He says: "And I think that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense: that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground of implied assumpsit, that in modern times courts of law have assumed a jurisdiction upon this subject." This passage must be taken to admit the existence of an implied contract, and does not appear to us to be inconsistent with, or to outweigh, the clear expression of the opinion of the judges in *Ashby v. Ashby*, 7 B. & C. 444.

Several inconveniences and difficulties were pointed out on both sides, in the course of the argument, as likely to arise from the adoption of each of the rules contended for; but we think that the rules suggested by the defendant's counsel will be found much more simple, and less liable to the inconveniences pointed out, than that contended for on behalf of the plaintiff.

After entertaining considerable doubt on the subject, we have come to the conclusion that the rule most in conformity with the authorities, the principles of law and the convenience of the case, is to look to the number of original co-contractors for the purpose of determining the aliquot part which each contributor is to pay. And, the defendant in the present case having paid into court a sum sufficient to cover the amount due in proportion to the number of the original contractors, the rule for entering the verdict for the defendant must be made absolute.²

¹Vol. II. p. 1509, in 4th edition.

²"The first judicial intimation that a surety might sue at common law for contribution is believed to be the following remark of Lord KENYON in *Turner v. Davies* (1796) 2 Esp. 479: 'I have no doubt, that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole, he has a right to call on his co-surety for contribution.' Five

BATTERSEY'S CASE.

MICHAELMAS. COMMON PLEAS, 1623.

[Winch, 48.]

AN action upon the case was brought against one *Hordecre* upon an *assumpsit*, and he declared that the Defendant had arrested one *Battersey*, by vertue of a Commission of Rebellion out of the *Cinque ports*, and that the Plaintiff keeping a Common Inne, the Defendant brought the said *Battersey* to his Inne, and requested the Plaintiff to keep him a day and a night, and promised in consideration there upon that he would save him harmless; and he shewed that he kept the prisoner accordingly; and that the said *Battersey* brought an action of false imprisonment against him, and recovered against him, upon which the action accrewed: and upon *non assumpsit* pleaded, it was found for the Plaintiff, and now it was moved in arrest of judgement, because he had not shewed that the said *Battersey* was lawfully arrested and imprisoned, and then if a man will without cause arrest a man, and promise in this case, no action will lie, for it is no consideration because that the imprisonment is unlawful, but *HOBERT chief justice, HUTTON and WINCH contrary*: for be the imprisonment lawful, or not lawful, he might not take notice of that: as if I request another man to enter into another mans ground, and in my name to drive out the beasts, and impound them, and promise to save him harmless. this is a good *assumpsit*, and yet the act is *Tortious*, but by *HUTTON*, where the act appears in it self to be unlawful, there it is otherwise, as if I request you to beat another, and promise to save you harmless, this *assumpsit* is not good, for the act appears in it self to be unlawful, but otherwise it is as in our case, when the act stands indifferent, but *HOBERT* said, it may be there is a difference between a publick officer, and a private man, for if the Sheriff arrest a man unlawfully, and promise as before, this is a good *assumpsit*, but perchance otherwise of a private man as here, but in the principal case, the Defendant had pleaded *non assumpsit*, and this implies a Lawful imprisonment, for otherwise the Defendant might have given the unlawful imprisonment in evidence, and judgement was commanded to be entered for the Plaintiff.

years later, in North Carolina, the surety failed to obtain contribution, because he sued at law instead of in equity. *Carrington v. Carson*, Cam. & N. Conf. R. 216."

Cowell v. Edwards (1800) 2 Bos. & P. 268, is the first case in which contribution was squarely allowed in a court of law.

For authorities pro and con, see Ames' Cases on Suretyship (from which this note is taken), p. 537, note.—Ed.

MERRYWEATHER v. NIXAN.

KING'S BENCH, 1799.

[8 *Term Reports*, 186.]

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered £840 he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron THOMSON at the last York assizes the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord KENYON, C. J., said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that ~~this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.~~¹

Rule refused.

The case of *Philips v. Biggs*, Hardr. 164, was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

BAILEY AND ANOTHER, EXECUTORS v. BUSSING.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1859.

[28 *Connecticut Reports*, 455.]

ASSUMPSIT. The plaintiffs sued as executors of one Aaron Turner. In 1852, a judgment was recovered against Turner, the defendant

¹See the admiralty case of *The Englishman* (1895) L. R. Probate Div. 212, 215-218, in which the principal case is commented upon and limited.—Ed.

Bussing, and one Whitlock, for an injury to a person travelling on the highway, caused by the negligent management of a public stage in the running of which the defendants were alleged to be jointly interested. The defendant, Bussing, was the driver of the stage, and the injury was caused by his negligence. Turner paid the amount of the judgment, and the present suit was brought by his executors to recover one-third of the amount so paid from Bussing. On the trial before the superior court, on the general issue closed to the court, the plaintiffs introduced the record of the judgment, with parol evidence of the character of the injury for which it was recovered and of the relation of the defendant and of Turner to it, and proved the payment of \$1,300 by Turner in satisfaction of the judgment; and upon this evidence claimed the right to recover. The defendant claimed that there could be no recovery in the suit, because Turner and the defendant were both wrong-doers, between whom there could be no legal claim for contribution, and on the ground that, if the defendant was liable at all, it would be only in case and not in assumpsit. The court rendered judgment for the plaintiff, and the defendant moved for a new trial.

ELLSWORTH, J. This is an action of assumpsit, to compel a contribution for money paid on a judgment against three defendants, Whitlock, Aaron Turner, the plaintiffs' testator, and Bussing, the present defendant. That there was a judgment rendered by the superior court for Fairfield County at its February term in 1852, against Whitlock, Turner, and Bussing, and that Turner was compelled to pay, and did pay, on the execution, the whole amount of the judgment, or such a sum as was received in satisfaction of the judgment, is admitted or not denied. This evidence, it is said, would in law *prima facie* entitle the plaintiffs to recover one-third of the sum paid from the defendant, and that there must be such recovery unless there is something peculiar to the present case which saves it from the application of the principle ordinarily applicable to such cases.

If this judgment had been recovered on a joint contract or joint liability of any kind sounding in contract, the production of the judgment, and proof of payment by Turner of the whole sum, would of course show a good cause of action in the plaintiffs for the recovery from Bussing of one-third the amount paid. Is there anything on this record which, when taken in connection with the evidence received in the case, distinguishes this case from the one just supposed.

The defendant insists that that judgment was rendered in an action of tort, and that in that class of cases there is to be no contribution among wrong-doers; the maxim of law being, as he claims, that among tort-feasors there is no contribution. To meet this objection, the plaintiffs offered evidence, and we think with entire propriety, to prove that, while the maxim might be true as a general rule, the case on trial belonged to a class of cases to which it had no application,

for that here there was no personal wrong, not even negligence in a culpable sense, on the part of Turner, and that he had been found guilty only by implication, or legal inference from a supposed relation to Bussing, the actual wrong-doer, through whose neglect the other two defendants had been subjected by the jury.

No objection was made to the reception of the evidence, and we think none could properly have been made. The court received it, and found the fact to be as claimed by the plaintiffs, that Turner was not present, and had no participation in the negligent conduct of the driver of the stage which caused the injury to Mrs. Haight, notwithstanding that, under the particular charge of the court in that case, the jury found that Turner was, in a legal sense, implicated and liable, even though there was not any actual wrong on his part.

What then is this case? And what is the true doctrine of the law as to contribution, or, as it may be, full indemnity, where there has been no illegal act or conduct on the part of him who seeks for a contribution?

And first, let us remark, that we apprehend that there can be no objection among the parties themselves, to proof *aliunde* that a joint judgment in an action on the case like the present, was for the default or neglect of one of the defendants only. This fact appears not unfrequently on the face of the record itself, as when the master is sued for the negligence of his servant, but if the form of the action does not show it, and an inquiry is necessary to prove it, we know of no rule of evidence which precludes or forbids such inquiry. Such is the constant practice in actions on contracts, whatever be the form of the declaration or judgment, and the same course must be proper in this instance. It must be a very stubborn rule of law to raise in our minds any doubt upon the subject.

The reason assigned in the books for denying contribution among trespassers is, that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser it is said cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or as the case may be a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal in what appears to be right, an assistant rendering aid to a sheriff in the execution of process, or common carriers, to whom is committed and who innocently carry away property which has been stolen from the owner. Indemnity, or contribution to the full amount, is allowable here, and it can be enforced by action, if refused, whether the person seeking it has been subjected in case or assumpsit to the

damages of which he complains. And since in many instances the person injured has an election to sue in case or assumpsit, it is not possible that the form of action in which the party seeking for an indemnity or contribution has been subjected, should be the criterion of his right to call for it. One partner or one joint proprietor may do that which will subject all the rest in case or assumpsit, as the fact may be, but there may be a right to contribution notwithstanding, and in some cases, if indeed the present is not one of them, a full indemnity may be justly demanded from the person doing the wrong, by the other partners whom he has involved in loss by his wrongful act. The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong-doers is not to be applied. Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like.

One of the earliest cases where the maxim is recognized is *Merryweather v. Nixan*, 8 T. R. 186, where the plaintiff was the active wrong-doer. Having paid the whole damage, he sought for a contribution. It was denied him, and rightfully so, upon the strength of the maxim referred to. But even here, lest a wrong inference should be drawn from the decision, Lord KENYON, C. J., says: "This decision will not affect cases of indemnity where one man employed another to do an act not unlawful in itself." The earlier case of *Philips v. Biggs*, Hardres, 164, in which this point was raised, was never decided. In *Wooley v. Batte*, 2 Car. & P. 417, before Justice PARKE, one stage proprietor had been sued alone in case for an injury to a passenger through the neglect of the coachman, and, having paid the damages, he brought assumpsit for a contribution, and recovered on the ground that in him there was no personal fault. In *Adamson v. Jarvis*, 4 Bing. 66, suit was brought for indemnity by an auctioneer against his employer, he having sold goods which did not belong to his employer, and for which he had been compelled to pay upon a judgment recovered against him by the owner, being himself innocent. The court held that he could recover. BEST, C. J., said: "From the inclination of the court in the case in Hardres and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. In *Betts v. Gibbins*, 2 A. & E. 57, Lord DENMAN, C. J., says: "The general rule is, that between

wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself. If they were acting *bona fide*, I cannot conceive what rule there can be to hinder the defendant from being liable for the risk." Again, speaking of *Battersey's case*, *Winch*, 48, he says that it shows that there may be an indemnity between wrong-doers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. In *Story on Partnership*, § 220, the learned commentator says, speaking of the maxim that there is no contribution among wrong-doers, "but the rule is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the innocence and propriety of the act, and the tort is one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between the constructive wrong-doers, whether partners or not." The cases are all brought together in *Chitty on Contracts*, 502, where the author most fully sustains by his own remarks the qualifications of the rule laid down by Lord DENMAN. I will here leave this topic, only repeating my remark that the maxim in question is scarcely worthy of being considered a general rule of law, for it is applicable only to a definite class of cases, and to that class the case before us does not belong.

A few words will suffice as to the remaining objection, which goes to the form of action. The defendant insists that it should have been case, and not *assumpsit*, and that the evidence adduced by the plaintiff does not support his declaration. We think this objection is not well founded, and that the plaintiff has brought the proper action. He sues for money paid, laid out, and expended, which, to say the least, it was the duty of the defendant to pay, quite as much as *Whitlock and Turner*, and it was paid in satisfaction of a judgment against the three. If *assumpsit* will not reach such a case, it must be because there are no merits in the case upon which to sustain any action, which we have endeavored to show is not the fact.

That judgment was *prima facie* evidence of a joint debt or duty against the three, and the further evidence adduced by the plaintiff did not vary the apparently good cause of action, but was offered for the purpose of proving that *Turner* paid the whole judgment, and to show the character of the negligence for which the defendants had been subjected, and whose negligence it was in fact that had thus involved him in such a heavy loss. The payment by *Turner* was not a voluntary payment, nor was it made officiously, nor on a mere moral obligation. Had it been, possibly the defendant here could avoid any contribution. But it was an act of necessity. Mr. and Mrs. *Haight* demanded the whole judgment of *Turner*, and he paid it on the execution. Such a payment I must think stands on the same ground,

if my reasoning hitherto is correct, as if it had been made on a judgment founded on a joint contract. In equity and justice it is money paid for the person who, in the end, is bound to pay the debt, or so much of it as belongs to him to pay. Why then should the plaintiff sue in case rather than assumpsit?

Let us look at some of the cases of assumpsit for money paid, and the principle settled by them. Generally, it is sufficient if the money is paid for a reasonable cause and not officiously. *Brown v. Hodgson*, 4 Taunt. 189; *Skillin v. Merrill*, 16 Mass. 40; *Jefferys v. Gurr*, 2 B. & Ad. 833; *Pownal v. Ferrand*, 6 B. & C. 439; *Exall v. Partridge*, 8 T. R. 308; *Toussaint v. Martinnant*, 2 T. R. 100. So where it has been paid to relieve a neighbor's goods from legal distraint in his absence, *Jenkins v. Tucker*, 1 H. Bl. 90, for there was a legal duty resting on the defendant. So to defray the expenses of his wife's funeral, for there was a like duty. So to reimburse the expenses of bail for pursuing the principal and bringing him back and surrendering him in court. *Fisher v. Fallows*, 5 Esp. 171. So for getting the defendant's goods free, which had been distrained by the landlord for the plaintiff's debt, they being at the time on the tenant's premises. *Exall v. Partridge*, 8 T. R. 308. Or for money paid to indemnify the owner for the loss of his goods, which the plaintiff, an auctioneer, had by mistake delivered to the defendant, who had appropriated them to his own use. *Brown v. Hodgson*, 4 Taunt. 189. Though of this case Lord ELLENBOROUGH, in *Sills v. Laing*, 4 Campb. 81, said that he thought the action should have been special, but the right of action he did not question. So where money has been paid by a surety, or by one of several joint debtors. 1 Steph. N. P. 324, 326. So where one has accepted for honor a protested bill and paid it. In *Pownal v. Ferrand*, 6 B. & C. 439, TENTERDEN, C. J., says: "The plaintiff is entitled to recover in assumpsit upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter;" and Lord LOUGHBOROUGH, in *Jenkins v. Tucker*, 1 H. Bl. 90, remarked that there are many cases of the sort (the funeral expenses of another's wife in his absence), where a person having paid money which another was under a legal obligation to pay, though without his knowledge or consent, may maintain an action to recover back the money so paid. The views of Chitty, in his treatise on Contracts, p. 469, and of Greenleaf, in his treatise on Evidence, vol. 2, sec. 108, are in harmony with this principle, that where the plaintiff shows that, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, he has paid money, not officiously, which the defendant ought to have paid, a count in assumpsit for money paid will be supported.

These cases are most abundant to show that the present action is well brought and should be sustained, if the payment made by Turner

was not, as it certainly was not, an unnecessary or officious payment. We conclude therefore that the objections we have been considering ought not to defeat the right of the plaintiff to recover, and we do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.

PALMER, APPELLANT, v. WICK AND PULTENEYTOWN
STEAM SHIPPING CO., LTD., RESPONDENTS.

HOUSE OF LORDS, 1894.

[*Law Reports*, 1894, *Appeal Cases*, 318.]

APPEAL against a judgment of the Second Division of the Court of Session, Scotland, reversing a decision of the Lord Ordinary (WELLWOOD).¹

This action was raised at the instance of the Wick and Pulteneytown Steam Shipping Company, the respondents, against George Palmer, a stevedore, the appellant, for payment of a moiety of a sum of £600 awarded jointly and severally against the appellant and respondents as damages for the death of a workman engaged by the appellant in unloading the respondents' ship, and also for half of the costs awarded against them in the same terms. These sums the respondents had paid in full and had taken an assignation to the decrees. This is a sufficient statement here of the facts, as they are very fully given in the Law Peers' opinions.

LORD HERSCHELL, L. C. The question raised in this case is a somewhat novel one. On the 17th of March, 1892, in two conjoined actions, in which Mrs. Fowles and others were pursuers, and the present appellant and respondents were the defenders, the Court of Session decreed and ordained the defenders jointly and severally to make payment of sums amounting to £600. On the 24th of May, 1892, a similar decree was made as regards the sum of £239 4s. 1d., the pursuers' costs of the action. The pursuers, as they were entitled to do, sought payment of the entire sum of £839 4s. 1d. from the present respondents, who were by the decrees made severally as well as jointly liable. The respondents paid the entire amount, but took from the pursuers an assignation of the judgment, and of the moneys thereby secured. The respondents thereupon commenced an action to recover one-half of the amount so paid by them from the appellant. This action the appellant maintained was incompetent on the ground that there is no contribution between

¹20 Court Sess. Cas. 4th Series (Rettie), 275.

wrongdoers, that the judgment had been satisfied, and that the assignation of it to the respondents was ineffectual to confer on them any right to recover in this action.

The first of the two conjoined actions was instituted by Mrs. Fowlis on behalf of herself and some of her children, and by others of her children, who were majors, against the respondents, to recover damages for the loss of her husband and the father of the children, whose death was alleged to have been due to the negligence of the defenders. His death was occasioned by the fall of a part of the tackle which was being used in the discharge of a vessel belonging to the defenders. They denied the negligence imputed to them, and alleged that if there had been any negligence it was that of the appellant, a stevedore employed to discharge the ship. The pursuers thereupon brought an action against him also, and the two actions were by order conjoined. The jury found negligence on the part of both the defenders. The decree of the 17th of March, to which allusion has already been made, was the decree applying this verdict. The decree of the 24th of May related to the costs.

My Lords, we have before us in the present action only the pleadings and verdict in the conjoined actions. It is at least consistent with these that the jury may have found their verdict of negligence against the shipping company, not on the ground of any personal default on the part of the company or its managers, but by reason of some negligence imputable to the master of the vessel. It is important to bear this in mind.

The learned counsel for the appellant did not contest the proposition that in general, where one of two co-obligants discharges the entire debt, he is entitled, unless there be some equity to the contrary, to call for an assignation of it, and to use such assignation for the purpose of enforcing payment of the share of his co-obligant. It is no answer to such an action to say that the whole of the debt has been discharged, and that there was, therefore, nothing to assign. There can be no doubt that the decrees of the 17th of March and 24th of May created joint and several debts. Why, then, should a co-debtor, who has paid the entire sum due, and received an assignation (it is unnecessary to inquire whether he could have demanded it), when he seeks to recover the share of his co-debtor, be subject more than other co-obligants to the answer that, the entire debt having been discharged, nothing remains due on the judgment, and that it can, therefore, no longer be proceeded on? The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that the law will not permit or assist any wrongdoer to recover contribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a primâ facie case by the production of the judgment and assignation. He has no need to rely on the joint wrong,

or to go behind the judgment and assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. Suppose a settlement were arrived at before the case was tried, and the wrong-doers gave a joint and several bond in discharge of the pursuer's claim, can it be doubted that, if one of them were forced to pay the whole, he could recover from the other his share? Why should the case be different where the issue is a decree that they shall jointly and severally pay? The learned judges in the Inner House, differing from the Lord Ordinary, have decided in favour of the pursuers in the present action. I am not disposed to dissent from their conclusion unless it can be clearly shewn to be contrary to the established law of Scotland.

There is certainly no express decision on the point. The appellant relied mainly on a dictum of Baron HUME. That learned judge said, "It is all unum negotium in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents." The observation that there was no right to mutual relief was not in any way necessary to the decision. It was a mere dictum. On the other hand, Lord BANKTON and Lord KAMES have both indicated views favouring the right to relief by a person bound ex delicto against his co-obligant.

It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of quasi-delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord WATSON holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favour of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather v. Nixan*,

8 T. R. 186. The reasons to be found in Lord KENYON's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson v. Jarvis*, 4 Bing. 66, BEST, C. J., in delivering the judgment of the Court, referred to the case of *Philips v. Biggs*, Hard. 164, which he said was never decided; "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the Court in this last case, and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration.

For these reasons I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.¹ From these authorities, which are to some extent conflicting and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the dicta of those writers who negative the existence of such a right can be held to contemplate every case of quasi-delict, whatever be its nature. They *primâ facie* refer to proper delicts, and might *ex paritate rationis* be extended to every quasi-delict which, according to the phraseology of Scotch law, *sapit naturam delicti*; but they cannot, in my opinion, be fairly read as referring to quasi-delicts which involve no moral offence on the part of the delinquent. The opinions expressed by Lord President INGLIS, and more recently by Lord SHAND, point strongly to that interpretation. These opinions refer, no doubt, to persons who in their trust capacity have been guilty of acts or omissions injurious

¹As Lord WATSON's opinion deals with the Law of Scotland, most of it is omitted, as is the short concurring opinion of Lord SHAND.—ED.

to the estate under their charge and amounting to quasi-delict; but it is obvious that the exception which they suggest cannot be founded on the circumstance that the co-delinquents were trustees, but must rest on the principle that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency.

I have not hitherto noticed the English case of *Merryweather v. Nixan* (8 T. R. 186). Assuming it to be an authority establishing the general rule for which the appellant contends—a proposition which seems to admit of doubt—I can only regard it as a positive rule of the common law of England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptance.

LORD HALSBURY. I concur with the proposition that the case of *Merryweather v. Nixan*, 8 T. R. 186, has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated; but I am not prepared to differ from the views entertained by the Lord Chancellor and my noble and learned friend Lord WATSON when dealing with the jurisprudence of Scotland.

The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a personal contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or quasi-delicts and delicts proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit; but I think that in England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather v. Nixan*, 8 T. R. 186.

*Interlocutor appealed from affirmed, and appeal dismissed with costs.*¹

¹On this whole subject see an excellent article by Theodore W. Reath in 12 Harv. Law Rev. 176-194, where English and American cases are cited and discussed.

See also, Cooley on Torts (2d ed.) 170-172.—ED.

SECTION III.

THE DEFENDANT HAS RECEIVED A BENEFIT AT THE PLAINTIFF'S HAND.

1. THE BENEFIT WAS CONFERRED WITHOUT REQUEST.

(a) Plaintiff Intended to Benefit Defendant.

GRYMES v. BLOFIELD.

TRINITY. KING'S BENCH, 1594.

[*Croke's Elizabeth*, 541.]

DEBT upon an obligation of twenty pounds. The defendant pleads, that J. S. surrendered a copyhold tenement to the use of the plaintiff in satisfaction of that twenty pounds, which the plaintiff accepted. It was thereupon demurred.—POPHAM and GAWDY held it to be no plea; for J. S. is a mere stranger, and in no sort privy to the condition of the obligation; and therefore satisfaction given by him is not good. Vide 36 Hen. 6; "Bar," 166; 7 Hen. 4, pl. 31.—Afterwards, in Easter Term, 31 Eliz. by POPHAM and CLENCH, *cateris Justiciariis absentibus*, it was adjudged for the plaintiff.

Crumlish's Adm'r v. Cent. Imp. Co. (1893), 38 W. Va. 390, 395, 397, per BRANNON, J.:

But this payment was made by a stranger, without request or ratification by the debtor, so far as appears. Does it satisfy the judgment? As it seems to me, the answer depends upon whether you mean as to the creditor or debtor. It remains a correct legal proposition to the present, that one man, who is under no obligation to pay the debt of another, can not without his request officiously pay that other's debt and charge him with it. If the debtor ratify such payment, the debt is discharged, and he becomes liable to the stranger for money paid to his use. If he refuse to ratify it, he disclaims the payment and the debt stands unpaid as to him. In the one case the stranger would at law sue the debtor for money paid to his use; in the other enforce the debt in the creditor's name for his use. If his payment is not ratified, he may go into equity praying that, if the debtor ratify it said debtor may be decreed to repay him, or, if the debtor do not ratify the payment, that the debt be treated as

unpaid as between him and the debtor, and that it be enforced in his favor as an equitable assignee. *Neely v. Jones*, 16 W. Va. 625; *Moore v. Ligon*, 22 W. Va. 292; *Beard v. Arbuckle*, 19 W. Va. 133.

But how as to the creditor? When a stranger pays him the debt of a third party without the request of such third party, as in this case, can the creditor say the debt is yet unpaid and enforce it against the debtor, as is attempted to be done by Jamison & Co.? Can he accept such payment and say, because it was made by a stranger, it is no payment? Is his acceptance not an estoppel by conduct *in pais*, as to him?

There has been a difference of opinion in this matter. The old English case of *Grymes v. Blofield*, Cro. Eliz. 541 (decided in Elizabeth's reign) is the parent of the cases holding that even the creditor accepting payment from a stranger may repudiate, and still enforce his demand as unpaid. That case is said to have decided that a plea of accord and satisfaction by a stranger is not good, while Rolle. Abr. 471 (condition F.) says it was decided just the other way. DENMAN, C. J. questioned its authority in *Thurman v. Wild*, 39 E. C. L. 145. Opposite holding has been made in England in *Hawkshaw v. Rawlings*, 1 Strange, 24. Its authority is questioned at the close of the opinion by CRESSWELL, J., in *Jones v. Broadhurst*, 67 E. C. L. 197, as contrary to an ancient decision in 36 Hen. VI. and against reason and justice. PARKE, B., seemed to think it law in *Simpson v. Eggington*, 10 Exch. 845. It was followed in *Edgecombe v. Rodd*, 5 East. 294, and *Stark v. Thompson*, 3 T. B. Mon. 296. Lord Coke held the satisfaction good. Co. Litt. 206b, 207a. See 5 Reb. Pr. (New) 884; 7 Rob. Pr. (New) 548. The cases of *Goodwin v. Cremer*, 83 E. C. L. 757, and *Kemp v. Balls*, 28 Eng. Law & Eq. 498, seem to hold that payment must be made by a third person as agent for and on account of debtor was his assent or ratification. In New York old cases held this doctrine. *Clow v. Borst*, 6 Johns, 37; *Bleakley v. White*, 4 Paige, 654. But later, in *Wellington v. Kelly*, 84 N. Y. 543, ANDREWS, J., said that the old cases were doubtful, but had not been overruled, but it was not necessary in that case to say whether it should longer be regarded as law, and the syllabus makes *a quere* on the point. It was held in *Harrison v. Hicks*, 1 Port. (Ala.) 423, that "payment of a debt, though made by one not a party to the contract, and though the assent of the debtor to the payment does not appear, is still the extinguishment of the demand." The opinion says that, as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request or subsequent express or implied. This doctrine is sustained by *Martin v. Quinn*, 37 Cal. 55; *Gray v. Herman*, 75 Wis. 453 (44 N. W. Rep. 248); *Cain v. Bryant*, 15 Heisk. 45; *Leavitt v. Morrow*, 6 Ohio St. 71; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Harvey v. Tama Co.*, 53 Ia. 228 (5 N. W. Rep. 130).

Bish. Cont. § 211, holds that, if payment "be accepted by creditor in discharge of debt, it has that effect." Sec. 2 Whart. Cont. § 1008.

It seems utterly unjust and repugnant to reason, that a creditor accepting payment from a stranger of the third person's debt should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. The creditor has himself for this purpose allowed him to make himself a *quasi* party, and consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? In that case can the stranger recover back? What matters it to the creditor who pays? As the Supreme Courts of Wisconsin and Ohio in cases above cited said, this doctrine is against common sense and justice. It does not at all infringe the rule that one can not at law make another his debtor without request to allow such payment to satisfy the debt as to the creditor; and this Court, while recognizing the rule that one can not officiously pay the debt of another and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment makes the payment in the eyes of a court of equity operate to satisfy the creditor, and render the stranger a creditor of the debtor. *Neeley v. Jones*, 16 W. Va. 625. I know that in that case it is held that, "if a payment by a stranger is neither ratified nor authorized by the debtor, it will not be held to be a discharge of the debt;" but, though this point is general, that was a case of the stranger seeking to make the debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor. So I hold that, when Jamison & Co. received the money for this judgment, it operated as a discharge as to them.¹

¹Accord: *Wolff v. Matthews* (1889) 39 Mo. App. 376. Contra: *Thomson v. Thomson* (1902) 78 N. Y. Supp. 389.

The principal case leaves unquestioned the doctrine that an officious intermeddler acquires nothing for his pains. The following is an early statement of the principle: "If one become my bayliff of his own wrong, without my appointment, he is accompetable to me, but I am not compeliabie to make him any allowance for his expenses about my business." Gawton and the Lord Dacres Case (1591) 1 Leon. 219.—Ed.

SIR JOHN ROBINSON v. CUMMING.

HIGH COURT OF CHANCERY, 1742.

[2 *Atkyns*, 409.]

IT came before the Chancellor upon exceptions to a Master's report, who had allowed the defendant £120 the value of presents he had made formerly to the plaintiff's wife.

The case which the defendant makes is this, that he being a particular friend of Mr. *Sheffield's*, the grandfather of Mrs. *Robinson*, who was about sixteen at the time of his death, had made her several valuable presents; and that Mr. *Sheffield* by his will has expressly devised his whole estate to the defendant, in case he should marry his granddaughter, which shews that he approved of the match, and had likewise made him executor.

The plaintiff insists, that the defendant had insinuated himself too much into the favour of this old man, and that the young lady had never given him the least encouragement, as his circumstances were by no means equal to hers, she being a very great fortune, and he having only £100 *per an.* at most.

Lord Chancellor [HARDWICKE],

I think, in cases of this nature, these rules may be laid down, That if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon a reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risques, and loses by the attempt, he must take it for his pains: the defendant's case, upon all the circumstances, being a good deal of this sort, I am of opinion the Master ought not to have allowed him the value of the presents; and therefore the plaintiff is right in the exception.

There were other exceptions in the same cause.

IN *Pickslay v. Starr* (1894) 27 N. Y. Supp. 616, the referee said: A gift is defined to be "a voluntary transfer of his property by one to another, without any consideration or compensation therefor. To

make it valid, the transfer must be executed, for the reason that, there being no consideration therefor, no action will lie to enforce it." *Gray v. Barton*, 55 N. Y. 72. The proofs in the present case show conclusively, as it seems to me, that the defendant's plain intention, when he delivered the \$2,500 check to the plaintiff, was to make the plaintiff the usual Christmas gift. It certainly was not delivered as a payment on account of the plaintiff's salary, or on account of any indebtedness due to him from the defendant. The plaintiff did not ask for it. The delivery of it was a purely voluntary act on the part of the defendant, and when, a couple of days later, the plaintiff thanked him for the "present," and also for his "present" to Mrs. Pickslay, the defendant said that he was glad that they were pleased. The act that the defendant did he would not have done had he at that time remembered the new agreement with the plaintiff, by which the plaintiff's salary had been substantially increased; but it was exactly what he intended to do. The check was drawn by him, or by his direction, that it might be given to the plaintiff as a Christmas gift. It was so given. The defendant says: "Having been in the habit of doing that for six years previously, I did it that time." And he cannot now be permitted to avoid the legal consequences of his voluntary and intentional act, on the ground that he did it by mistake, not recollecting facts which, had they been in his mind, would have deterred him from doing as he did.

PRATT, J. The important question is whether the \$2,500 check received by plaintiff from defendant the day before Christmas, 1889, was a gift, or whether it was an advance on account of plaintiff's salary. The referee has found it to be a gift, and we do not see how he could reasonably have decided otherwise. The referee's opinion discusses the matter so fully that there is no need to pursue the argument further. The suggestion that a check cannot be a valid gift has no weight. It may well be that, had the maker of the check stopped its payment, an action against the maker could not have been maintained. But, after the money was paid, the transaction could not be revoked; the gift was complete. That is to say, although the gift of the check might not be binding and irrevocable, the check was the means and instrument by which the gift of money was effected. Judgment affirmed, with costs.

CULLEN, J. I concur, on the ground that if the defendant made the present under mistake, or forgetting that plaintiff's salary had been increased, he should, upon discovering the error, have disapproved the transaction and notified the plaintiff.¹

¹And see *Davis v. Ford* (1833) Wright, 200; *Kershaw Co. v. Town of Camden* (1890) 33 S. C. 140.—Ed.

STOKES AND ANOTHER, OVERSEERS OF ST. VEDAST'S,
OTHERWISE FOSTER v. LEWIS AND ANOTHER, OVER-
SEERS OF ST. MICHAEL LE QUERN.

MICHAELMAS, KING'S BENCH, 1785.

[1 *Term Reports*, 20.]

THIS was an action for money paid, laid out, and expended, by the plaintiffs to the use of the defendants.

The question arose upon the payment of a sexton's salary. At the trial, which came on before Lord MANSFIELD at the last sittings in London, it appeared that by the act 22 and 23 Car. 2. c. 11, which was an additional act for rebuilding the city of London after the great fire, and uniting parishes, etc., amongst others the parishes of St. Vedast's and St. Michael le Querne were united; and that since that time one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry. That only nine vacancies in the office of sexton had happened since, all of which had been filled up agreeably to this custom. That in the year 1759, the sexton's salary was fixed at £20 per annum, which was agreed to be paid equally by both parishes. That the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum; to recover a moiety of which this action was brought.

The defence set up was, that the last election of a sexton was not a joint one; and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish.

Lord MANSFIELD, at the trial, being of opinion that this action did not lie, nonsuited the plaintiffs.

Erskine, Mingay, and Law, showed cause against a motion which *Sir Thomas Davenport* had made for a new trial.

One of the first principles of law is, that an assumpsit cannot be raised by paying the debt of another against his will. The present plaintiffs have here paid this money in their own wrong, after notice from the other parish that they meant to dispute the right, and to elect a sexton of their own. If any party was aggrieved here it was the sexton, and he might have brought his action against the parish who refused to pay their quota.

Sir Thomas Davenport, Bearcroft, and Chambre, in support of the rule, said that they had offered to give evidence that a joint vestry did meet on the 17th February, 1784, when the sexton was chosen, after the notice on the 11th that the other parish would not meet. Therefore, although there was notice that they would not meet, yet if they

did actually meet, the court would not consider now whether the meeting was perfectly formal and regular: that was a proper circumstance for the jury to decide. If there is a joint obligation to pay a debt, one party may pay the whole, and bring an action for the moiety, even with the dissent of the other party. Whether this was a joint obligation should also have been left to the jury.

LORD MANSFIELD, C. J. All the argument is beside the question. The merits of this election are not material here, and the validity of the meeting on the 17th is not to the purpose. The facts that gave rise to the question are not disputed: the dispute arises concerning the election of a sexton, and the way of trying it is by refusing to pay the sexton elected; the whole is notoriously in litigation. Under these circumstances, therefore, one parish paid the quota of the other in spite of their teeth; then can it be said, that this action for money paid, laid out, and expended, will lie? Certainly not. This action must be grounded either on an express or implied consent: here is neither. Another strong objection to this action is, that it is trying the right of the sexton without his being a party to it.

WILLES, and ASHHURST, Justices, concurred.

BULLER, J. If this were held to be a joint obligation, it would be saying that the sexton might bring his action against one of the parishes for the whole sum: which is not the case.

*Rule discharged.*¹

NICHOLSON v. CHAPMAN.

MICHAELMAS, COMMON PLEAS, 1793.

[2 *Henry Blackstone*, 254.]

A QUANTITY of timber belonging to the plaintiff was placed in a dock on the bank of a navigable river. The timber was accidentally loosened, carried by the tide to a considerable distance, and left at low water upon a towing-path. The defendant found it in that situation and voluntarily conveyed it to a place of safety beyond the reach of the tide at high water. Nicholson made a demand upon Chapman for its delivery, but this the latter refused to do unless compensated for his services in saving and keeping the timber.²

On this day, after consideration, the opinion of the Court was thus delivered by

LORD CHIEF JUSTICE EYRE. The only difficulty that remained with

¹Accord: *Mulligan v. Kenny* (1882) 34 La. Ann. 50.—ED.

²Short statement substituted for that of the Reporter.—ED.

any of us, after we had heard this case argued, was upon the question, whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage, but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompence is due for the saving, and that our law has also provided that this recompence should be a lien upon the goods, which have been saved. Goods carried by sea, are necessarily and unavoidably exposed to the perils which storms, tempests and accidents, (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens, that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompence, for the encouragement of those who engage in so dangerous a service.

Such are the grounds, upon which salvage stands; they are recognized by Lord Chief Justice HOLT, in the case which has been cited from *Raymond*, and *Salkeld*, 1 Ld. Raym. 393; Salk. 654, pl. 2. But see how very unlike this salvage is, to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this, gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it, till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its mooring is found damage feasant, if that should happen to be the case. But this is not a case of damage feasant; the timber is found lying upon the banks of the river, and is taken into the possession, and under the care of the Defendant, without any extraordinary exertions, without the least personal risque, and, in truth, with very little trouble. It is therefore a case of mere finding, and taking care of the thing found, (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompence from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards

enforcing the payment.¹ So it would, if a horse had strayed, and was not taken as an estray by the lord under his manerial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expence, he had found out the owner.² So it would be in every other case of finding, that can be stated, (the claim to the recompence differing in degree, but not in principle;) which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost, or mislaid, and voluntarily puts himself to some trouble and expence, to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompence, which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer dog, 2 Black. 1117, was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity, support the lien in the case of salvage. Not only public policy and commercial necessity, do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were to be established. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill designing people to turn their floats and vessels adrift, in order that they might be paid for finding them. I mentioned in the course of the cause, another great inconvenience, namely, the situation, in which an owner seeking to recover his property in an action of trover will be placed, if he is at his peril to make a tender of a sufficient recompence, before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the

¹It seems probable, that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labour, in which the Court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompence would come properly before a jury. Reporter's note.—Ed.

²To the 4th edition of H. Blackstone's reports the following note is appended: "It is, however, laid down that a mere voluntary courtesy will not support an *assumpsit*. *Lampleigh v. Braithwaite*, Hob. 105; and see the Reporter's note, 3 Bos. & Pul. 251; 1 Saund. 264 (n), 5th ed. . . . According to the civil law, the party is allowed to recover. See Wood's Institute, 256; and see Bull. N. P. 45. Whether the finder of goods is bound to take them into his possession, or if taken into his possession to keep them safely, see *Isaak v. Clark*, 2 Bulstr. 312; *Mulgrove v. Ogden*, Cro. Eliz. 219.—Ed.

number of them ought not to be increased; perhaps it is better for the public, that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward, upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case, should take upon himself the burthen of proving the nature of the service which he has performed, and the *quantum* of the recompence which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being non-suited in an action of trover.

Judgment for the Plaintiff.¹

Reeder v. Anderson's Administrators.—Assumpsit (1836), 4 Dana, 193.

Opinion of the court, by Chief Justice ROBERTSON.

The only question to be considered in this case is, whether the law will imply a promise, by the owner of a runaway slave, to pay a reasonable compensation to a stranger for a voluntary apprehension and restitution of the fugitive. And, though such friendly offices are frequently those only of good neighborship, which should not be influenced by mercenary motives or expectations—nevertheless, it seems to us that there is an implied request from the owner, to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property.

Whether, according to the proof, there was any such claim to reparation or indemnity in this case, is very doubtful; but, because it is doubtful, the circuit court erred in instructing the jury to find as in case of a non-suit.

¹*Chase v. Coreoran* (1871) 106 Mass. 286, was decided, it would seem, upon the authority of the principal case. In the former case, it appeared that a boat was adrift; that it was taken possession of by plaintiff, who expended labor and money in its repair and preservation. Held that owner of boat was liable in assumpsit for such necessary repairs and expenses.

The court said: "We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it. *Nicholson v. Chapman*, 2 H. Bl. 254, 258 and note; *Amory v. Flynn*, 10 Johns. 102; *Tome v. Four Cribs of Lumber*, Taney, 533, 547; 3 Dane Ab. 143; *Story on Bailments*, §§ 121 *a*, 621 *a*; 2 Kent Com. (6th ed.) 356; 1 Domat, pt. 1, lib. 2, tit. 9, art. 2."—ED.

And, therefore, it is considered by the court that the judgment be reversed, the verdict set aside, and the cause remanded for a new trial.¹

FORSYTH v. GANSON.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1830.

[5 *Wendell*, 558.]

By the Court, SUTHERLAND, J.² If the plaintiff can recover at all, it must be on the ground that the intestate, John Ganson, was legally bound to support his stepmother, Esther Ganson, and that having refused to provide for her, the law implies a promise on his part to pay the plaintiff whatever he has necessarily expended in her support. There is no evidence, either of a request on the part of the intestate to the plaintiff to provide for Esther Ganson, or of an express promise to pay him for supporting her. The jury, by their verdict, have found that the intestate either had funds in his hands which he was bound to apply to the support of his stepmother, or that upon a good consideration he had promised to provide for her; and I think the verdict is warranted by the evidence in the case.

After the father had given up all his property to his sons John and James, and they had divided it between them, Timothy Beckus testifies that James, speaking of the division to John, said, "I consider that I have given you \$1,000 the best of the bargain. I have had a family while you have had none, *and I expect the old people will remain with you.*" James made no reply; but that he understood that he was to support his father and stepmother is shewn by the testimony of Edward Waterous, who states that after the division between

¹In *Preston v. Neale* (1858) 12 Gray, 222, it was held that a landlord, not an innkeeper, was entitled to a reasonable compensation for storing chattels left by an outgoing tenant, until demand made, but not afterwards. After citing and relying on *Nicholson v. Chapman*, *supra*, and principal case, the court said, per METCALF, J.:

"There is also an ancient authority on this point, to wit, Doctor and Student, c. 51, where is this passage: 'Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the meantime put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found.'"—Ed.

²A portion of the opinion, relating to the admissibility of evidence, is omitted.—Ed.

John and James, he heard John say that the old people were to live with him. They accordingly did remain with him during his father's life, and the stepmother remained some time afterwards without any objection or complaint on the part of the intestate. John Hascal also testified that he heard the father say in John's presence that he had given up all his property to him, and that he was to maintain him and his wife; and the same witness further stated that he had heard a great deal of conversation in the Ganson family about their property, and that he understood from such conversation that John was to support the old people. This evidence warrants the conclusion that, in the division of the property of the father between the sons, the support of the parents was taken into consideration in the portion allotted to John, and that he undertook, in consideration of an extra allowance then made to him, to take care of and provide for the old people during their lives.

The intestate in this case being legally bound to provide for Mrs. Ganson, the services and supplies afforded to her by the plaintiff were advantageous to the defendant, and may well be considered as having been rendered at his request.

New trial denied.¹

¹Accord: *Rundell v. Bentley* (1889) 53 Hun, 272.

So husband who has not provided his wife with necessities is liable to any one who does, *Morrison v. Holt* (1861) 42 N. H. 120; 80 Am. Dec. 120, 123, note (collecting cases); especially is this so if husband has expelled her from his home and refuses support, but the stranger acts at his peril, *Cartwright v. Bate* (1861) 1 Allen, 514; *Cunningham v. Reardon* (1868) 98 Mass. 583 (also holding husband liable for reasonable funeral expenses of wife whom he had expelled and refused to support). On the question of necessities in such cases, see notes in 10 Am. Dec. 462-465 (including a discussion of wife's counsel fees in actions of divorce); *Johnson v. Williams* (1851) 3 G. Greene, 97; 54 Am. Dec. 491 and note; *Sprayberry v. Merk* (1860) 30 Ga. 81; 76 Am. Dec. 637.—Ed.

So necessities furnished to a child whom defendant was bound to support. *Manning v. Wells* (1894) 29 N. Y. Supp. 1044; *Porter v. Powell* (1890) 79 Ia. 151; so where A lent the wife £30 to pay a physician for medical services rendered to her, A was subrogated to the physician's claim. *Harris v. Lee* (1718) 1 P. Wm. 482; so a person advancing money to a deserted wife for her support. *Deare v. Sutton* (1869) L. R. 9 Eq. 151; *Jenner v. Morris* (1861) 3 De G. F. & J. 45, S. C. 1 Dr. & Sm. 218; *Kenyon v. Farris* (1880) 47 Conn. 510; *Walker v. Simpson* (1844) 7 W. & S. 83. Contra, *Skinner v. Tirrell* (1893) 159 Mass. 474 (where authorities are collected).

In all these cases the plaintiff rendered a service to the defendant for which the latter was liable. If the defendant be not liable, then the plaintiff is merely a meddler and may not recover. *Everts v. Adams* (1815) 12 Johnson, 352, as to which *quære*; but the decision in *Force v. Haynes* (1840) 2 Harr. (N. J.) 385—although decided on great consideration and examination of the authorities—is clearly not to be supported, because by law the owner was liable for the maintenance of his slave. In line with the last two cases is *Savage v. McCorkle* (1888) 17 Ore. 42.—Ed.

PATTERSON v. PATTERSON.

COURT OF APPEALS, 1875.

[59 *New York*, 574.]

IN an action brought to foreclose a mortgage executed by defendant, and to secure defendant's bond to William Patterson, plaintiff's testator, defendant set up as counter-claim a claim for rent due him from the testator at the time of his decease, and also for the necessary funeral expenses of the deceased paid by him to the underiakers who assigned and transferred to him their account therefor. The court found that there was due the defendant and unpaid for rent, at the time of the testator's death, the sum of \$877.50, and that the reasonable and necessary funeral expenses paid by defendant were the sum of \$184.30, but that such claims were not proper set-offs or counter-claims, and therefore refused to allow the same.¹

FOLGER, J. The defendant has set up and proved another item, that of the funeral expenses of the burial of the dead body of the testator; and seeks to have the amount of these apply to diminish the recovery against him. The trial court has found that the amount thereof, \$184.30, was reasonable and necessary, and that it was incurred and paid by the defendant, but came to the conclusion, which must be considered one of law, that it was not a set-off to the claim of the plaintiff.

I have no doubt but that the reasonable and necessary expenses of the interment of the dead body of one deceased, are a charge against his estate, though not strictly a debt due from him. The ground of this is the general right of every one to have decent burial after death; which implies the right to have his body carried, decently covered, from the place where it lies to a cemetery or other proper inclosure, and there put under ground. *Regina v. Stewart*, 12 Ad. & Ell., 773, citing *Gilbert v. Buzzard*, 2 Hagg. Consist. R. 333; see, also, *Chapple v. Coope*, 13 M. & W. 252. In the last case, in which an infant, a widow, was held liable on her contract for the funeral expenses of the burial of her deceased husband, it was said, that "there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule to say, that it may be classed as a personal advantage and reasonably necessary to him." This right existing, the law casts upon some one the duty of seeing that it is accorded. 12 Ad. & Ell. *supra*. So it would seem, at common law, that if a poor person of no estate dies, it is the duty of him under whose roof his body lies, to carry

¹The statement of the case is shortened and only that part of the opinion is given relating to the item of funeral expenses.—Ed.

it, decently covered, to the place of burial. 12 Ad. & Ell., *supra*. The husband surviving is bound to bury the corpse of his wife; and in his absence, another, a relative, with whom she has lived up to her death, having directed the funeral and paid the expense, may recover it of the husband. *Jenkins v. Tucker*, 1 H. Bl. 90; 13 M. & W. *supra*; and see *Ambrose v. Kenison*, 10 C. B. 776. And where the owner of some estate dies, the duty of the burial is upon the executor. Toller *Laws of Exrs.*, 245, bk. 3, cap. 1, § 1. And our Revised Statutes (2 R. S. 71, § 16) recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. *Tugwell v. Heyman*, 3 Camp. 298. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. And so, in *Rogers v. Price*, 3 Younge & Jervis, 28, it was held that an executor, with assets, is liable to a brother of the deceased for the proper expenses of a funeral ordered and paid for by the latter in the absence of the former. In *Hapgood v. Houghton's Executor*, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. And in *Adams v. Butts*, 16 Pick. 343, it was held that an account for the funeral expenses of a deceased person might be set off by the defendant in action against him by an administrator for the work and labor of the deceased in his lifetime. *Price v. Wilson*, 3 N. & M. 512, is sometimes cited as an authority that "there is no case which goes the length of deciding that if the funeral be ordered by another person, to whom credit is given, the executor is liable." PATTERSON, J., did there use that language. But in *Green v. Salmon*, 8 Ad. & Ell. 348, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person, is not liable to the undertaker; if it lays down more, the law stated is extrajudicial." See also *Rappelyea v. Russel*, 1 Daly, 214, where the subject of the liability of a personal representative is well considered by the learned chief justice of the New York Common Pleas.

To a claim for the payment of such expenses by an executor, the objection does not lie that the rule of distribution of assets will be improperly interfered with if the claim is allowed and paid. Unless there is some objection arising out of statutory provisions, these expenses must be preferred to all other debts (*Toller on Exrs.*, 245), not

excepting debts due by record, even to the sovereign. *Parker v. Lewis*, 2 Devereux [S. C.], 21. Even in the case of an insolvent estate, the executor has been allowed the reasonable expenses of the funeral of his testator, on a plea of *plene administravit*. *Edwards v. Edwards*, 2 Cr. & M. 612.

No statutory provisions are now in mind which interpose an obstacle. Though our statute of payment of debts and legacies (2 R. S. p. 87, § 27) gives the order in which the executor shall make payment of debts against the estate, and though there is no provision there for a priority of payment of funeral expenses, it is not to be held therefrom that the common-law rule is abrogated. Those expenses are not to be treated as a debt against the estate, but as a charge upon the estate, the same as the necessary expenses of administration. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300. The expenses of probate of will precede the formal authority to the executor, but are allowed to him on an accounting. So should funeral expenses be. The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take place at all (*Rex v. Stewart*, *supra*), and against a proper public sentiment, that it should not take place with decency. *Kanasan's Case*, 1 Greenl. 226; see *Jones v. Ashburnham*, 4 East. 460; *Regina v. Fox*, 2 Q. B. 246. The Revised Statutes, already cited, impliedly give discretion that the executor, even before probate, shall pay the funeral charges; and notwithstanding the statute setting out the order of payment, if he follow that direction or that authority, the amount will be allowed to him as part of the expenses of his trust, with the restriction always that the amount is no greater than is necessary. And if they are paid by another than the executor, and reimbursed by or collected of the latter, there must be the same result. It follows that the defendant is entitled to be paid from the assets of the estate in the hands of the plaintiff, the amount which he has incurred and paid for funeral expenses.

The judgment appealed from, must be modified so as to allow to the defendant, in diminution of the amount of the claim established against him, the sum of \$184.30. He is also entitled to the interest thereon. There is no day named in the findings or in the testimony on which the sum was paid by the defendant. He alleges in his answer that the claim was assigned to him on the 25th April. 1872, and if interest is reckoned from that date, it will not be unjust to him.

The judgment so modified, should be affirmed, without costs to either party in this court.

All concur, except GROVER, J., dissenting.

Judgment accordingly.¹

¹While it is settled law that the husband is responsible for the proper burial of his wife and expenses thereby incurred, for which another authority may be

BARTHOLOMEW v. JACKSON.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1822.

[20 *Johnson*, 28.]

IN error, on *certiorari* to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded *non assumpsit*. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by ten o'clock the next morning. J. waited until that hour, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for fifty cents, on which the justice gave judgment, with costs.

PLATT, J., delivered the opinion of the court. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's

cited, *Cunningham v. Reardon* (1868) 98 Mass. 538, still he may recover the same out of the wife's estate in preference to her creditors. *Lightbourn v. McMyn* (1886) L. R. 33 Ch. D. 575; but he is not liable for expenses incurred at the direction of an officious intermeddler. *Quin v. Hill* (1886) 4 Dem. 69; *Fay v. Fay* (1887) 43 N. J. Eq. 438 and note, in which English and American cases are collected and classified.

It may be of interest to note that the Roman as well as the common law permitted the recovery of funeral expenses by the pratorian *actio funeraria in bonum et æquum concepta* (Girard, *Mannuel de Droit Romain* (3d ed.) 621-622 and note). Therefore in the leading case of *Jenkins v. Tucker* (1788) 1 H. Black. 90, referred to in principal case, Lord LOUGHBOROUGH, C. J., trained as he was in Scotch, i. e., civil law, had no difficulty in supporting the action.—ED.

house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.¹

Judgment reversed.

CALVERT v. ALDRICH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868.

[99 *Massachusetts*, 74.]

THE defendant filed a declaration in set-off on an account annexed for two-fifths of the cost of repairs of a machine shop in Lowell: and the only question in dispute was the liability of the plaintiff for any portion of such cost.

FOSTER, J. The issue in this action is on an account of one cotenant in common against another to recover from the defendant in set-off part of the cost of certain needful repairs made by the plaintiff in set-off upon the common property. It is not founded upon any contract between the parties, but upon a supposed legal obligation which, if its existence were established, the law would imply a promise to fulfil.

The doctrine of the common law on this subject is stated by Lord COKE as follows: "If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 2000 *b*;

¹"The case of *Bartholomew v. Jackson*, 20 John. 28, is one, like perhaps hundreds which may be found in the books. . . . In that case it was held, that labor voluntarily performed by the plaintiff for the defendant, without his privity or request, however meritorious and beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. A claim for compensation or damages, in the shape of interest, for money applied to the benefit of another, without his privity or request, must rest on the same foundation with any other service. The benefit received is not the test. It must be requested or agreed to be received. Every man is permitted to regulate his own affairs in his own way; and he is the best judge when and where he will have services performed or money advanced for him. There is no equity in making him pay for the use of money, although employed for his benefit, without his request." Per SPENCER, Senator, in *Renss. Glass Factory v. Reid* (1825) 5 Cow. 587, 620.

Accord: *Merritt v. Am. Dock Co.* (1891) 13 N. Y. Supp. 234; *Railroad v. Turcan* (1894) 46 La. Ann. 155.—Ed.

Ib. 54 *b.* And in another place he says: "If there be two joint tenants of a wood or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione faciendâ* against the other. This is said to be because of "the præminence and privilege which the law gives to houses which are for men's habitation." Bowles's case, 11 Co. 82.

In *Carver v. Miller*, 4 Mass. 561, it was doubted by Chief Justice PARSONS whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne, c. 1, revised by St. 1795, c. 74.

In *Loring v. Bacon*, 4 Mass. 575, the plaintiff was seised in fee of a room and the cellar under it, and the defendant of the chamber overhead and of the remainder of the house; the roof was out of repair; the defendant, being seasonably requested, refused to join in repairing it; and thereupon the plaintiff made the necessary repairs, and brought assumpsit to recover from the defendant his proportion of their cost. This, it will be observed, was not a case of tenancy in common, but of distinct dwelling-houses, one over the other. Chief Justice PARSONS said: "If there is a legal obligation to contribute to these repairs, the law will imply a promise. We have no statute nor any usage on the subject, and must apply to the common law to guide us." "Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff." It was not absolutely decided that an action on the case would not lie, but the intimations of the court on the subject were such that no further attempt appears to have been made. The relations between tenants in common were not actually involved in this case, and the remarks touching the writ *de reparatione* were only incidental and by way of illustration.

Doane v. Badger, 12 Mass. 65, was an action on the case. The plaintiff had a right to use a well and pump on the defendant's land; and the defendant had removed the pump and built over the well, thereby depriving the plaintiff of the use of the water. The judge before whom the case was tried had instructed the jury that the defendant, by the terms of a deed under which he claimed, was bound to keep the well and pump in repair, although they were out of repair when he purchased, and, without any previous notice or request, was liable in damages for the injury the plaintiff had sustained by his neglect to make repairs. The court held that no such evidence was admissible under the declaration, the cause of action stated being a misfeasance, and the proof offered being of a nonfeasance only; also, that a notice and request were indispensable before any action could be maintained. Mr. Justice JACKSON in delivering the opinion made some general observations, unnecessary to the decision of the cause, the correctness of which requires a particular examination. He

said that the action on the case seems to be a substitute for the old writ *de reparatione faciendâ* between tenants in common, and could not be brought until after a request and refusal to join in making the repairs. He added: "From the form of the writ in the register, it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes, '*in ipsius dispendium non modicum et gravamen.*' It is clear that until he have made the repairs he cannot in any form of action recover anything more than for his loss as of rent, &c., while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money for that purpose." *Mumford v. Brown*, 6 Cowen, 475, a *per curiam* opinion of the supreme court of New York, and *Coffin v. Heath*, 6 Met. 80, both contain *obiter dicta* to the same effect, apparently founded upon *Doane v. Badger*, without further research into the ancient law. If it were true that the writ *de reparatione* was brought by one cotenant, after he had made repairs, to recover of his cotenant a due proportion of the expense thereof, there would certainly be much reason for holding an action on the case to be a modern substitute for the obsolete writ *de reparatione*. But all the Latin forms of the writ in the Register, 153, show that it was brought before the repairs were made, to compel them to be made under the order of court. Indeed, this is implied in the very style by which the writ is entitled, *de reparatione faciendâ*, viz.: of repairs to be made; the future participle *faciendâ* being incapable of any other meaning. This also appears in *Fitzherbert*, N. B. 127, where the writ between cotenants of a mill is translated; the words, *in ipsius dispendium non modicum et gravamen* (quoted by Judge JACKSON), being correctly rendered, "to the great damage and grievance of him," the said plaintiff. FITZHERBERT says: "The writ lieth in divers cases; one is, where there are three tenants in common or joint or *pro indiviso* of a mill or a house, &c., which falls to decay, and one will repair but the other will not repair the same; he shall have this writ against them." In the case of a ruinous house which endangers the plaintiff's adjoining house, and in that of a bridge over which the plaintiff has a passage, which the defendant ought to repair, but which he suffers to fall to decay, the words of the precept are, "Command A. that," &c., "he, together with B. and C., his partners, cause to be repaired." The cases in the Year Books referred to in the margin of *Fitzherbert* confirm the construction which we regard as the only one of which the forms in that author are susceptible, namely, that the writ *de reparatione* was a process to compel repairs to be made under the order of court. There is nothing in them to indicate that an action for damages is maintainable by one tenant in common against another because the defendant will not join with the plaintiff in repairing the common property. In a note to the form in the

case of a bridge, it is said in Fitzherbert: "In this writ the party recovers his damages, and it shall be awarded that the defendant repair, and that he be distrained to do it. So in this writ he shall have the view contra, if it be but an action on the case for not repairing, for there he shall recover but damages." There is no doubt that an action on the case is maintainable to recover damages in cases where the defendant is alone bound to make repairs for the benefit of the plaintiff without contribution on the part of the latter, and has neglected and refused to do so. See *Tenant v. Goldwin*, 6 Mod. 311; S. C. 2 Ld. Raym. 1089; 1 Salk. 21, 360.

The difficulty in the way of awarding damages in favor of one tenant in common against his cotenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. Upon a review of all the authorities, we can find no instance in England or this country in which, between cotenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join. We are satisfied that the law was correctly stated in *Converse v. Ferre*, 11 Mass. 325, by Chief Justice PARKER, who said: "At common law no action lies by one tenant in common, who has expended more than his share in repairing the common property, against the deficient tenants, and for this reason our legislature has provided a remedy applicable to mills." The writ *de reparatione faciendâ* brought before the court the question of the reasonableness of the repairs proposed, before the expenditures were incurred. It seems to have been seldom resorted to; perhaps because a division of the common estate would usually be obtained where the owners were unable to agree as to the necessity or expediency of repairs. Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved. But if we have fallen into any error in our examination of the original doctrines of the common law of England, it is at least safe to conclude that no action between tenants in common for neglecting or refusing to repair the common property, or to recover contribution for repairs made thereon by one without the consent of the other, has been adopted among the common law remedies in Massachusetts.

This result is in accordance with the rulings at the trial.

*Exceptions overruled.*¹

¹Accord: *Leigh v. Dickinson* (1884) L. R. 15 Q. B. Div. 60, holding that while no recovery could be had in a common-law action, an allowance would be made in partition in chancery for improvements. *Thompson v. Newton* (1884) 2 Pa. County Reports, 362, holding that one tenant in common cannot sue another in debt or assumpsit for work and labor in the management

BOSTON ICE COMPANY *v.* POTTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1877.

[123 *Massachusetts Reports*, 28.]

CONTRACT on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the Superior Court, before WILKINSON, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice, and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens'

of the common property, in the absence of evidence of a contract between them: see also *Taylor v. Baldwin* (1851) 10 Barb. 626; *Chapin v. Smith* (1884) 52 Conn. 260; *Bazemore v. Davis* (1875) 55 Ga. 504, 519; *Williams v. Coombs* (1896) 88 Me. 183; *Woolever v. Knapp* (1854) 18 Barb. 265; *Killmer v. Wuchner* (1890) 79 Ia. 722. But compare *Fuselier v. Lacour* (1848) 3 La. Ann. 162; *Smith v. Wilson* (1855) 10 La. Ann. 255.

A tenant in common could not sue his co-tenant at common law who has received more than his share of the profits. *Thomas v. Thomas* (1850) 5 Ex. 28; *Henderson v. Eason* (1851) 17 Q. B. 701; *Norris v. Gould* (1884) 17 Phila. 318; but in the United States recovery is usually permitted by statutes. See 1 Stimson, Am. St. Law. § 1378.

And see, on the relation of tenants in common in respect of improvements and liability for use and occupation. *Gage v. Gage* (1890) 66 N. H. 282, where the authorities are elaborately cited and discussed.—Ed.

Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found. that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind. or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Oreutt v. Nelson*, 1 Gray, 536. 542; *Winchester v. Howard*, 97 Mass. 303; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*, 1 Allen, 74; *Oreutt v. Nelson*, 1 Gray, 536. 542; *Mitchell v. Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson*, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*, 2 H. & N. 564 was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron BRAMWELL, though the other judges do not mention it.¹

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

¹According to *Mudge v. Oliver* (1861) 1 Allen, 74, it would seem, that a count for goods sold and delivered would have lain against the purchaser if the goods had been in existence at the time. The retention of the goods under these circumstances would have waived the defence arising from the lack of request.—ED.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties of the ice were not in existence.¹

Exceptions overruled.

UNITED STATES *v.* PACIFIC RAILROAD. PACIFIC RAILROAD *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1887.

[120 *United States Reports*, 227.]

THESE were appeals from the Court of Claims. The case is stated in the opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

The Pacific Railroad Company, the claimant in this case, is a corporation created under the laws of Missouri, and is frequently designated as the Pacific Railroad of that State, to distinguish it from the Central Pacific Railroad Company incorporated under the laws of California, and the Union Pacific Railroad Company incorporated under an act of Congress, each of which is sometimes referred to as the Pacific Railroad Company.

From the 14th of August, 1867, to the 22d of July, 1872, it rendered services by the transportation of passengers and freight, for which the United States are indebted to it in the sum of \$136,196.98, unless they are entitled to offset the cost of labor and materials alleged to have been furnished by them, at its request, for the construction of certain bridges on the line of its road. The extent and value of the services rendered are not disputed. It is only the offset or charge for the bridges which is in controversy; and that charge arose in this wise: During the civil war, the State of Missouri was the theatre of active military operations. It was on several occasions invaded by Confederate forces, and between them and the soldiers of the Union conflicts were frequent and sanguinary. The people of the State were divided in their allegiance, and the country was ravaged by guerilla bands. The railroads of the State, as a matter of course, were damaged by the contending forces; as each deemed the destruction of that means of transportation necessary to defeat or embarrass the movements of the other. In October 1864, Sterling Price, a noted Confederate officer, at the head of a large force, invaded the State and advanced rapidly toward St. Louis, approaching to within a few days' march of the city. During this invasion, thirteen bridges upon the main line and southwestern branch of the company's road were de-

¹Accord: *Pittsburgh Plate Glass Co. v. Macdonald* (1903) 182 Mass. 593, 595.—Ed.

stroyed. General Rosecrans was in command of the Federal forces in the State, and some of the bridges were destroyed by his orders, as a military necessity, to prevent the advance of the enemy. The record does not state by whom the others were destroyed; but their destruction having taken place during the invasion, it seems to have been taken for granted that it was caused by the Confederate forces, and this conclusion was evidently correct. All the bridges except four were rebuilt by the company. These four were rebuilt by the government, and it is their cost which the government seeks to offset against the demand of the company. Two of the four (one over the Osage River and one over the Moreau River) were destroyed by order of the commander of the Federal forces. The other two, which were over the Maramee River, it is presumed, were destroyed by the Confederate forces.¹

The cost of the four bridges rebuilt by the government amounted to \$181,548.89. The question presented is, whether the company is chargeable with their cost, assuming that there was no promise on its part, express or implied, to pay for them. That there was no express promise is clear. The representations and assurances at the conference called by General Rosecrans to urge the rebuilding of the bridges were not intended or understood to constitute any contract: and it is so found, as above stated, by the court below. They were rebuilt by the government as a military necessity to enable the Federal forces to carry on military operations, and not on any request of or contract with the company. As to the two bridges destroyed by the Federal forces, some of the officers of the company at that conference insisted that they should be rebuilt by the government without charge to the company, and, though they appeared to consider that those destroyed by the enemy should be rebuilt by the company, there was no action of the board of directors on the subject. What was said by them was merely an expression of their individual opinions, which were not even communicated to the board. Nor can any such promise be implied from the letter of the president of the company to the Quartermaster General in November, subsequent to the destruction of the bridges, informing him that the delay of the War Department in rebuilding them had prompted the company to "unusual resources"; that it was constructing the bridges over the Gasconade and the Moreau Rivers, and that the only bridge on the main line to be replaced by the government was the one over the Osage River, the company having replaced all the smaller, and was then replacing all the larger ones. The letter only imparts information as to the work done and to be done in rebuilding the bridges on the main line. It contains no promise, as the court below seems to have thought, that, if the government would rebuild the bridge over the Osage River, it should be re-

¹Statement of negotiations between General Rosecrans and the officials of the railroad company omitted.—ED.

imbursed for any other it might rebuild on the main line of the company. Nor do we think that any promise can be implied from the fact that the company resumed the management and operation of the road after the bridges were rebuilt; but on that point we will speak hereafter. Assuming, for the present, that there was no such implication, we are clear that no obligation rests upon the company to pay for work done, not at its request or for its benefit, but solely to enable the government to carry on its military operations.

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency,¹ the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

It is true that in some instances the works thus constructed may, afterwards, be used by the owner; a house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. *Zottman v. San Francisco*, 20 Cal. 96, 107. Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structures shall be built, or the repairs made, and the materials to be used; but upon none of these matters was the company consulted in the case before us. The government regarded the interests only of the army; the needs or wishes of the company were not considered. No liability, therefore, could be fastened upon it for work thus done.

We do not find any adjudged cases on this particular point.—whether the government can claim compensation for structures erected on land of private parties, or annexed to their property, not by their request, but as a matter of military necessity, to enable its armies to

¹So much of the opinion as relates to this question has been omitted.—Ed.

prosecute their movements with greater efficiency; and we are unable to recall an instance where such a claim has been advanced.

It follows from these views, that the government can make no charge against the railroad company for the four bridges constructed by it from military necessity. The court will leave the parties where the war and the military operations of the government left them.

The judgment of the Court of Claims must, therefore, be reversed, and judgment be entered for the full amount claimed by the railroad company for its services; and it is so ordered.

CAHILL v. HALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1894.

[161 *Massachusetts*, 512.]

CONTRACT, for the board and expense of shoeing a horse. Writ dated March 15, 1892.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows:

In 1886 the defendant, who was the owner of a mare called Mayflower, said to her son, "You take Mayflower and keep her until I call for her." Her son thereupon took possession of the mare, and kept it until its death in 1889, and paid the expense of keeping it. In 1888 the defendant's son, without her knowledge, raised a colt from the mare, and in 1890, without her knowledge or consent, employed the plaintiff to keep and train the colt for a carriage horse, agreeing to pay him therefor five dollars a week and the expense of shoeing. The defendant never had possession of the colt, and never gave any directions to her son regarding it, but after its birth she learned of the fact, and frequently saw it in the possession of her son.

The plaintiff kept the colt for thirty-four weeks, and expended eight dollars for shoeing, and rendered a bill therefor to the defendant's son. The defendant prior to the commencement of this action had no knowledge of the contract of her son with the plaintiff.

HOLMES, J. Whether the colt belonged to the defendant or to her son, the son had possession of it for his own benefit. Putting the case in the strongest way for the plaintiff, the defendant did no more than to lend the colt to her son. She did not know of the contract with the plaintiff. Her son did not purport to contract on her behalf, nor did the plaintiff rely upon any supposed authority from her, or render the services on her credit. When one person lends a horse to another without more, he does not authorize the latter to make him

answerable for its keep or improvement. See *Storms v. Smith*, 137 Mass. 201; *Howes v. Newcomb*, 146 Mass. 76, 80. Possession alone is no more ostensible authority to bind the owner for keeping and training than it is to sell, apart from statute. Even if circumstances could be imagined under which, without an actual knowledge of the owner, consent might be implied sufficient to create a lien under Pub. Sts. c. 192, § 32 (*Lynde v. Parker*, 155 Mass. 481), there is nothing in this case which would warrant the finding of an actual contract binding on the defendant. There is equally little ground for charging her upon a fictitious or quasi-contract. The plaintiff furnished his services under a valid contract with the son, and must look to him.¹

Judgment for the defendant.

(b) Plaintiff intended to Benefit Himself, not the Defendant.

WELSH v. WELSH.

SUPREME COURT OF OHIO, 1835.

[5 *Hammond*, 425.]

ASSUMPSIT for work, labor, materials and for money paid.

The facts which the plaintiff offered to prove were the following: A parol agreement was made between the plaintiff and defendant (they being brothers), that the plaintiff should grant to the defendant by lease or purchase, as should subsequently be agreed between them, a piece of land, being mostly wild, of about five acres, for the purpose of the plaintiff's erecting a fulling mill and other necessary buildings, to carry on the business of dyeing, fulling and manufacturing cloth, &c. In pursuance of this agreement, the defendant gave the plaintiff possession of said land, and the plaintiff went on and erected with the knowledge and permission of the defendant, a fulling mill and other buildings appurtenant thereunto, and a dwelling house, stable, &c., to a large amount, say one thousand dollars. After these things were done by the plaintiff, the defendant sold and conveyed away the said land, with all the erections and buildings, without the

¹If plaintiff cared for a horse bailed with him after the bailment had terminated by express declaration of owner as by repudiation of ownership, the plaintiff keeping the horse thereafter cannot hold the owner liable. *Earle v. Coburn* (1881) 130 Mass. 596; or if the bailor boarded and stabled a horse with one X after such termination of the bailment, the owner is not liable for such keep either to X or the plaintiff. *Keith v. De Busigny* (1901) 179 Mass. 255. See *Stokes v. Lewis* (1785) 1 T. R. 20, *ante*. p. 285.—Ed.

consent or knowledge of the plaintiff, turned him out of possession and put his grantee in, and put in his own pocket the entire avails of the labor, money and expenses of the plaintiff on the said premises.

HITCHCOCK, J., delivered the opinion of the Court.

The question for the consideration of the Court is, whether, upon the proof of the facts stated, the plaintiff would have a right to recover in *this form* of action.

The contract or agreement stated by the plaintiff's counsel is one of no ordinary character. It is not one by which the parties agree to sell or lease land, but that they will at some future period agree that one or the other shall be done. The terms are not specified, but are left for future arrangement. No price is fixed, no length of time for which a lease shall run, should a lease be agreed upon, no time in which payment shall be made. Nothing in fact but that the plaintiff shall go into possession, proceed with his works, and subsequently all shall be made right. The reason why the business was thus transacted is to be found probably in the fact, that the parties were brothers. But, notwithstanding the loose manner in which this agreement was made, I cannot doubt that a Court of chancery would compel the defendant to do justice. The circumstance that there was no writing, could make no difference in such Court. Possession was taken of the land, labor was performed, money expended, and it would be a fraud on the part of the defendant not to comply with the contract. The statute was made not to *encourage* but to *prevent* frauds.

It does not follow of course, that because chancery *might* relieve in a case like the present, therefore that law *will* in an action of assumpsit.

This action is founded upon the supposition that there was a contract which the plaintiff had a right to rescind in consequence of the conduct of the defendant. From the facts proposed to be proved, there can be no doubt the plaintiff had a right to rescind this contract. The defendant had put it out of his power to comply, by disposing of the property to a third person. After this he could not hold the plaintiff to fulfil on his part. But what right accrues to the plaintiff by rescinding? The law is well settled, that where a vendee has a right in consequence of the conduct of the vender to rescind, he may do it and recover back in an action for money had and received, the amount paid upon the contract. 1 Term, 133; 5 John. 85. Upon this point there is no controversy. The principle is admitted by the defendant's counsel. It would be immaterial whether the payment was made in money, or made in merchandise, or in work and labor. In either case the amount paid might be received, and upon the principle that the consideration for which the payment was made had failed.

In the present case, the object is not however to recover for any thing which was paid upon the contract, for nothing was paid. It is to

recover for work and labor done by the plaintiff for his own use and benefit, while he was in possession of the property. A payment made to a vender is for *his* benefit. But when this labor was performed, it was not for the benefit of the vender, nor supposed to be for his benefit. It was done with his knowledge and approbation, but intended alone for the use of the plaintiff. Although done with the knowledge of the vender, it was not done even at his request. I cannot see then upon what reason the principle which authorizes a vendee to recover back money paid upon a contract which is afterwards rescinded, can be applied to this case. It seems clear that it is an effort to extend this principle to a new class of cases. No authority precisely in point has been cited, and I presume no one favorable to the plaintiff's claim can be found. The case of *Gillett, adm'r of Clemens v. Maynard*, 5 John. 85, is somewhat analogous to the one now before the Court. In that case, however, money had been paid upon the contract; and the action was brought, not only to recover back this money, but also to receive pay for the improvements made while the intestate was in possession of the land. It was held by the Court, that the contract being rescinded, the plaintiff was entitled to recover back the money paid, with interest, but not any damages for the labor he had bestowed or the improvements he had made. Upon this part of the case the Court say, "The plaintiff, however, ought not to have received any compensation for the improvements. There was no express or implied undertaking by the defendant to pay for them. When the work was done by the intestate, it was for his own benefit; and if he voluntarily abandoned his contract, without any stipulation for the improvements, he must be deemed to have waived all claim to them." From the latter clause counsel infer, that if the plaintiff's intestate had not *abandoned* the contract, he might have recovered compensation for the improvements. Upon an examination of the case, however, I see no evidence of abandonment, except the death of the vendee, unless the circumstance of suing to recover back the money paid, furnishes this evidence. If the case of *Gillett v. Maynard* be law, I think it must be decisive of this case. Here the work, when done, was done for the plaintiff's benefit. There is no proof of any express promise, nor is there any implied promise on the part of the defendant to pay for it.

Further, the counsel for the plaintiff says, "If the question is, *what damages* have been sustained, you *must* declare on the *special contract*; if you go for the original consideration paid, you *rescind*, and *may rely* on the common counts;" and in support of this position cites, *Tower v. Burrell*, 1 Term, 133. Apply this principle to the present case and it defeats the action. The plaintiff does not "go for the original compensation paid," for no such consideration was paid. The real object is to recover compensation in damages for the labor performed. The plaintiff seeks to rescind the contract and then to

recover over and beyond what, according to the rules of law, as I have heretofore understood them, he has a right to recover upon that rescission. And no good reason can be assigned why he might not with equal propriety recover to any extent, damages which he may have sustained in consequence of the failure of the contract.

Had there been any express promise proven to pay for these improvements, the case would have been different. I conceive that there would be a moral obligation to constitute a sufficient consideration for such promise. The Supreme Court of the State of New York, in the case of *Frew v. Hardenburgh*, 5 John. 272, holds differently. But in that case the plaintiff took possession of the land without the consent of the defendant, and held that possession until ousted by an action of ejectment. As there is no express, so neither is there anything, from which to imply a promise, unless we establish the broad principle that, where there is a contract for the sale of land, and the contract fails in consequence of an act of the vender, the vendee can recover pay for the improvements made, in an action for work and labor. I am not willing to establish this principle. It is not necessary for the furtherance of justice. The law provided a complete and adequate remedy in an action upon the contract; and I cannot consent to give a new remedy for the purpose of saving this action.

No difference can be made in consequence of this contract having been by parol. This is not the fault of the law but of the parties. If the plaintiff has been improvident in entering into the contract, the Court cannot with propriety change any known rule of law to help him out of his difficulty.

I am aware that it is said that the action of assumpsit is as broad as a bill of equity. But it does not follow that if a plaintiff could have redress in a Court of equity, he can therefore have redress in a Court of law, provided he sues in assumpsit. Nor does it follow that because a plaintiff has an equitable claim against the defendant, he can enforce this claim if he sues in assumpsit. If he prosecutes his suit in a Court of law, he must in assumpsit, as well as any other form of action, show that he has a *legal right* of action. When this is shown, the action will be governed by equitable principles.

As it would seem to be just that the plaintiff should receive a compensation for his improvements, we have reflected whether he might not recover upon the money counts, upon the ground that the defendant has received money for the improvements made by the plaintiff, with which he might be charged as having received it to his use. But in this view of the case there is great, and as it appears to me, insuperable difficulty.

The interest of the plaintiff in the premises is an equitable interest. Of this interest the defendant could not deprive him unless with his own consent. The legal estate alone was in the defendant; and if he transferred the land, it must be subject to the plaintiff's equity,

especially if transferred to a person having notice of this equity. Now the case shows, that when this land was sold the plaintiff was in possession. The purchaser then must be chargeable with notice of all his rights. If so, then this equity may still be enforced. The plaintiff has been deprived of nothing but the possession, and to be restored to this, he must apply to the proper tribunal in the proper way. He may apply to a Court of chancery for a specific performance of the contract; and if there has been no laches on his part, I see no difficulty in his obtaining a decree, either in a specific performance, or for a compensation, as the merits of the case when presented may seem to require.

Upon the whole, a majority of the Court are of opinion, that the nonsuit was properly ordered, and that the plaintiff take nothing by his motion.

WRIGHT, J. My opinion does not accord with that of my brethren in this case. If the evidence offered was admissible under the issue, the nonsuit should be set aside. It is admissible, if it tend to prove the issue. The declaration is for *work, &c.*, in building a fulling mill, &c., for the defendant; for board, &c., furnished and paid for self and hands; for labor generally; for money paid, and had, and received, and on account stated. Issue is taken upon non-assumpsit.

The plaintiff offered to prove, that the defendant agreed with him to grant him, on a lease or purchase, as should be subsequently settled between them, about five acres of land, for the purpose of erecting a fulling mill, &c., and other buildings for manufacturing cotton, and put the plaintiff into possession, under the agreement; and that the plaintiff built, with the knowledge and permission of the defendant, the mill and other buildings, to the value of one thousand dollars, which he paid two workmen for; when the defendant, without the consent or knowledge of the plaintiff, sold the land and improvement, received the pay for them, turned the plaintiff out of possession, and put the purchaser in. The labor and expenditures by the plaintiff were on the defendant's land. A jury would be warranted in inferring, from the fact of the work being so done, that it was done for the defendant, and to oblige him to pay what they were worth. The evidence offered conduced directly to prove the issue, and should have been received. Whether the work was done and the money paid under a special agreement, which was open and subsisting, was a matter of fact to be proven before the jury. The ability to prove that state of things, would not have the effect to exclude evidence proper when offered. That there had been a special contract between the parties upon the subject of the suit, would not destroy the right to recover, in the common counts, unless open and subsisting, and the suits were to recover damages arising out of a breach of the contract. But when a defendant refuses to execute a special contract, he is not permitted to set up that as a pretext for retaining what he

has received in payments under it; in such cases, the plaintiff may hold the contract abandoned, and recover on the common counts. 12 John. R. 275; 7 J. R. 132; 1 Ohio R. 363; 7 T. R. 177.

So where the defendant has been guilty of fraud, as to the special contract, the plaintiff may consider it void, and recover on the common counts. 15 John. R. 475; 6 John. R. 110; 1 Com. on Con. 38; 1 Esp. R. 268; 2 Esp. R. 640.

So also where the contract is rescinded, or has been executed by the plaintiff, or put an end to by defendant, the plaintiff may disregard the contract, and resort to the common counts in assumpsit, to recover what he has paid. 7 Cranch Rep. 299; 4 Bos. & Pul. 351; 6 T. R. 136; 5 John. R. 84; Bul. N. P. 139; 18 John. R. 455; 11 Wheat. R. 250; 10 John. R. 37; 2 Mass. R. 415; Com. on Con. 317; *Newman v. McGregor*, *ante*, 349. And it is not necessary to give positive evidence of money had and received, but when, from the facts proved, it may be fairly presumed the action is maintained. Doug. R. 137. The action, says Lord MANSFIELD (Cowp. R. 807), "is governed by the most liberal equity. Neither party is allowed to trap the other in form."

Whether there was in fact, a special contract between these parties at all, or one still open, or that had originated in fraud by defendant, or which he had put an end to or rescinded, or whether the plaintiff had fulfilled, and whether anything had been paid by the plaintiff upon it in money, labor or board, were, in my opinion, questions of fact, and should have been left to the jury upon the proof, on broad and liberal principles of equity. 11 Wheat. R. 250. I am therefore on that ground for opening up the nonsuit and allowing a new trial. I incline to go much farther than is necessary to decide this case, and to hold, that wherever one man has availed himself of the labor, goods or money of another, recovery may be had in this form of action, for just what in equity and good conscience the party is entitled to, *all things considered*; subject only to this limitation, that where there was a contract price, no recovery shall be had for a greater sum than the one stipulated for. I can see no evil, or inconvenience, that would result from this. A recovery in this form would be as perfect a bar to a subsequent action, as if had in a suit upon the special contract, and each party may obtain a full statement of the real cause of action, by demand for a bill of particulars under our law. The proceeding is a simple one, and looks directly to the attainment of justice. Why, then, in such cases turn a plaintiff round into a Court of Chancery, or to a suit upon the special contract?¹

¹Accord: *Gillet v. Maynard* (1809) 5 Johns. 85; *Shreve v. Grimes* (1823) 4 Littell, 220; *Mathews v. Davis* (1843) 6 Humph. 324, to the effect that the vendee's remedy is not at law in an action of assumpsit, but solely in equity, as in *Bright v. Boyd* (1841) 1 Story, 478.

If the vendee in possession refuses to complete the purchase, although the

BARLOW v. BELL.

COURT OF APPEALS OF KENTUCKY, 1818.

[1 *Marshall*, 246.]

Judge OWSLEY delivered the opinion of the court.

Some time early in 1801, the appellant purchased from a certain John Bell, who acted as the agent of his father, William Bell, a tract of land in Barren county, and having obtained from the agent a deed of conveyance, he settled upon the land, and made lasting and valuable improvements.

Whilst the appellant was thus possessed of the land, but after the appellee's husband, William Bell, had departed this life, she, asserting title in her own right, brought suit, and finally succeeded in recovering the land.

To obtain compensation for his improvements, ~~the appellant then brought this suit in equity,~~ but the court being of opinion his claim could not be sustained, dismissed his bill with costs; and from that decree the appellant has appealed to this court.

As the labor bestowed in improving the land is sunk in the land, and was not done at the appellee's request, it is plain that she cannot, upon any common law proceeding, be subjected to the appellant's claim for compensation.

Nor have we been able to find any adjudged case, where the English courts of equity have, under such circumstances, decided upon the right to compensation; but regarding courts of equity, in supplying the defects of the common law, as being governed by the principles of natural justice, in the absence of all precedent, we should have no hesitation in relieving the possessor for improvements made upon the land whilst he, *bona fide*, considered it his own. The possessor, by bestowing his money and labor in meliorating the land, advances its value, and, consequently, the rightful owner, unless liable to the claim of compensation, is so much gainer by the loss of the possessor; contrary to the maxim, *nemo debet locupletari aliena jactura*.

But to bring himself within the influence of this principle, it is not enough that the possessor shows himself to have meliorated the land, but his money and labor must be bestowed under an honest conviction of his being the rightful owner of the land. For if he takes possession

vendor was both willing and ready to pass title, the authorities deny any allowance for improvements. *Rainer v. Huddleston* (1871) 4 Heisk. 223; *Guthrie v. Holt* (1876) 9 Box. 527.

If the value of the land is not enhanced, there should be no allowance for the alleged improvements. *Worthington v. Young* (1838) 8 Oh. 401; *Vaughan v. Cravens* (1858) 1 Head, 108.—Ed.

without title, and knowing the land belongs to another, he is himself guilty of a wrong, and although he may have expended his money, and bestowed his labor, his claim for compensation ought not to be sanctioned by a court of equity; but in such a case the maxim, *voluntati non fit injuria*, well applies.

As in the present case, therefore, the appellant is shown to have had a perfect knowledge of the appellee's title, and was advised of the consequences of a purchase from the agent of William Bell, before he made the purchase, he cannot be viewed in the favorable attitude of a *bona fide* possessor, so as to warrant the decree of a court of equity in his favor for improvements made upon the land.

The decree of the court below, dismissing his bill, is, consequently, correct, and must be affirmed with cost.

Scroggs v. Taylor (1818) 1 Marsh. 247.

Judge OWSLEY delivered the opinion of the court.

The appellant, not having settled upon the land under any contract with either of the appellees, or those through whom they claim, but under the mistaken impression of the land being within the adverse claim of Craig, purchased and settled under him. The court below, no doubt, decided correctly, in refusing¹ to compel the appellees to make compensation for the improvements made upon the land after notice of their claim, and properly dismissed the appellant's bill, with cost.

The decree must be affirmed, with cost.²

BRIGHT v. BOYD.

CIRCUIT COURT OF THE UNITED STATES, 1841.

[1 *Story*, 478.]

BILL in equity. The defendant recovered judgment in a suit at law against the plaintiff for possession of an estate which the plaintiff claimed to own by intermediate conveyances under an administration sale. The defect in the plaintiff's title was due to the failure of the administrator to file a bond as required by law. The plaintiff, at the time of his purchase, supposed that this bond had been filed, and

¹*Vide ante*, *Barlow v. Bell*.

²A still earlier case is *Whitledge v. Wait* (1804) *Sneed* (Ky.) 335. See notes to next case.—ED.

he seeks to recover compensation for permanent improvements made upon and greatly enhancing the value of the estate.¹

STORY, J. The case, then, resolves itself² into the mere consideration, whether the plaintiff is entitled to any allowance for the improvements made by him, or by those under whom he claims title, so far as those improvements have been permanently beneficial to the defendant and have given an enhanced value to the estate. There is no doubt that the plaintiff in the present bill is a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title. Indeed, he seems to have had every reason to believe that it was a valid and perfect title; and this also seems to have been the predicament of all the persons who came in under the title by the administration sale; for it is not pretended that any one of them had actual notice that no bond was given to the judge of probate previous to the sale. And, indeed, all of them, including the purchaser at the sale, acted upon the entire confidence that all the prerequisites necessary to give validity of the sale had been strictly complied with. The original purchaser was, if at all, affected only by the constructive notice which put him upon inquiry as to the facts necessary to perfect the right to sell. The statute of Maine of 27th of June, 1820, ch. 47, commonly called the Betterment Act, will not aid the plaintiff; for that statute applies only to cases where the tenant has been in actual possession of the lands for six years or more before the action brought by virtue of a possession and improvement, which term had not elapsed when this writ of entry was brought. So that in fact the whole reliance of the plaintiff must be upon the aid of a court of equity to decree an allowance to him for the improvements made by him and those under whom he claims, upon its own independent principles of general justice.

Two views are presented for consideration. First, that the defendant has lain by and allowed the improvements to be made without giving any notice to the plaintiff, or to those under whom he claims, of any defect in their title; which of itself constitutes a just ground of relief. Secondly, that if the defendant is not, by reason of his minority and residence in another State at the time, affected by this equity, as a case of constructive fraud or concealment of title; yet that, as the improvements were made *bona fide* and without notice of any defect of title, and have permanently enhanced the value of the lands, to the extent of such enhanced value the defendant is bound in conscience to make compensation to the plaintiff *ex æquo et bono*.

In regard to the first point, it has been well remarked by Sir WILLIAM GRANT (then Master of the Rolls), in *Pilling v. Armitage*,

¹This statement of facts, containing all that is necessary to an understanding of the case, has been substituted for the statement found in the report.—Ed.

²Only so much of the opinion is given as relates to this question.—Ed.

12 Ves. 84, 85, "That there are different positions in the books with regard to the sort of equity arising from laying out money upon another's estate through inadvertence or mistake; that person seeing that, and not interfering to put the party upon his guard. The case with reference to that proposition, as ordinarily stated, is that of building upon another man's ground. That is a case which supposes a total absence of title on the one side, implying, therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected that the party should advertise the other that he is acting under a mistake." The learned judge is clearly right in this view of the doctrine; and the duty of compensation in such cases, at least to the extent of the permanent increase of value, is founded upon the constructive fraud, or gross negligence, or delusive confidence held out by the owner; for under such circumstances the maxim applies: *Qui tacet, consentire videtur; Qui potest, et debet vetare, jubet, si non vetat*.¹ Whether this doctrine is applicable to minors who stand by and make no objection, and disclose no adverse title, having a reasonable discretion from their age to understand and to act upon the subject; and whether, if under guardianship, the guardian would be bound to disclose the title of his ward; and how far the latter would be bound by the silence or negligence of his guardian; and whether there is any just distinction between minors living within the State and minors living without the State,—these are questions of no inconsiderable delicacy and importance, upon which I should not incline to pass any absolute opinion in the present state of the cause, reserving them for further consideration, when all the facts shall appear upon the report of the Master. There are certainly cases in which infants themselves will be held responsible in courts of equity for their fraudulent concealments and misrepresentations whereby other innocent persons are injured.²

The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the Digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria*

¹See 1 Story, Eq. Jur. §§ 388, 389, 390, 391; Green v. Biddle, 8 Wheat. 1, 77, 78; 1 Madd. Ch. 209, 210.

²See 1 Story, Eq. Jur. § 385; 1 Fonbl. Eq. Jur. B. I. ch. 3, § 4; Savage v. Foster, 9 Brod. 35.

feri locupletiore.¹ I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits.² So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner.³ In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity.⁴ But it has been supposed that courts of equity do not, and ought not, to go further, and to grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law. I find that Mr. Chancellor WALWORTH, in *Putnam v. Ritchie*, 6 Paige, 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere opera-

¹Dig. lib. 50, tit. 17, l. 206.

²2 Story, Eq. Jur. §§ 799a, 799b, 1237, 1238, 1239; *Green v. Biddle*, 8 Wheat. 77, 78, 79, 80, 81.

³See also 2 Story, Eq. Jur. § 199b and note; *Id.* §§ 1237, 1238.

⁴*Ibid.*

tion of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief?

I have ventured to suggest that the claim of the *bona fide* purchaser under such circumstances is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. *Jure naturæ æquum est*. And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. *Certe*, say the Institutes, *illud constat; si in possessione constituto ædificatore, soli Dominus petat domum suam esse, ne solvat pretium materiæ et mercedes fabrorum; posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse*.¹ It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land.² The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*),³ and beyond what he has been reimbursed by the rents and profits.⁴ The like principle has been adopted into the law of the modern nations which have derived their jurisprudence from the Roman law; and it is especially recognized in France and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning.⁵ Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have an allowance of all expenses which have enhanced the value of the estate, so far as the increased value exists.⁶

¹Just. Inst. lib. 2, tit. 1, §§ 30, 32; 2 Story Eq. Jur. § 799, b; Vinn. Com. ad Inst. lib. 2, tit. 1, § 30, n. 3, 4, pp. 194, 195.

²See Green v. Biddle, 8 Wheat. 79, 80.

³Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; *Id.* l. 38; Pothier Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48.

⁴Dig. lib. 6, tit. 1, l. 48.

⁵Pothier De la Propriété, n. 343 to n. 353; Code Civil of France, art. 552, 555.

⁶Pothier De la Propriété, n. 350; Vinn. ad Inst. lib. 2, tit. 1. l. 30, n. 4, p. 195.

The law of Scotland has allowed the like recompense to *bona fide* possessors making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent.¹ The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded in natural justice and equity.² Grotius, Puffendorf, and Rutherford all affirm the same doctrine, as founded in the truest principles *ex æquo et bono*.³

There is another broad principle of the Roman law which is applicable to the present case. It is, that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him.⁴ Now, in the present case, it cannot be overlooked that the lands of the testator now in controversy, were sold for the payment of his just debts under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which, in conscience and equity, he and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement in order to avoid a circuitry of action to get back the money from the administrator and thus subject the lands to a new sale, or, at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuitry in order to do justice where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable.

These considerations have been suggested because they greatly weigh in my own mind after repeated deliberations on the subject. They, however, will remain open for consideration upon the report of the

¹Bell Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair Inst. b. 1, tit. 8, § 6.

²1 Mor. & Carl. Partid. b. 3, tit. 28, l. 41, pp. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102.

³Grotius, b. 2, ch. 10, §§ 1, 2, 3; Puffend. Law of Nat. & Nat. b. 4, ch. 7, § 61; Rutherford, Inst. b. 1, ch. 9, § 4, p. 7.

⁴Dig. lib. 6, tit. 1, l. 65; Pothier Pand. lib. 6, tit. 1, n. 43; Pothier De la Propriété, n. 343.

Master, and do not positively require to be decided, until all the equities between the parties are brought by his report fully before the court. At present it is ordered to be referred to the Master to take an account of the enhanced value of the premises by the meliorations and improvements of the plaintiff, and those under whom he claims, after deducting all the rents and profits received by the plaintiff and those under whom he claims; and all other matters will be reserved for the consideration of the court upon the coming in of his report.

In a later stage of the above case (2 Story, 605, 607), Mr. Justice STORY, in confirming the Master's report, said:

I have reflected a good deal upon the present subject; and the views expressed by me at the former hearing of this case, reported in 1 Story, 478, *et seq.*, remain unchanged; or rather, to express myself more accurately, have been thereby strengthened and confirmed. My judgment is that the plaintiff is entitled to the full value of all the improvements and meliorations which he has made upon the estate, to the extent of the additional value which they have conferred upon the land. It appears by the Master's report that the present value of the land with the improvements and meliorations is \$1,000; and that the present value of the land without these improvements and meliorations is but \$25; so that in fact the value of the land is increased thereby \$975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate.

The report will, therefore, be accepted and allowed; and a decree made in conformity to the present opinion.¹

¹Accord: *Whitledge v. Wait* (1804) Sneed (Ky.) 335; 2 Am. Dec. 721 and note; *Barlow v. Bell* (1818) 1 Marsh. 246, *ante*; *Bell's Heirs v. Barnet* (1829) 2 J. J. Marsh. 516; *Dufour v. Camfrane* (1822) 11 Mart. 605; *Thomas v. Thomas* (1855) 16 B. Mon. 420; *Albea v. Griffin* (1838) 2 Dev. & B. Eq. 9;

IN *Parsons v. Moses* (1864), 16 Iowa, 440, 444, DILLON, J., said:

It will aid us to understand the meaning and purpose of the several statutory provisions [of the Betterment Acts] above referred to, by recurring briefly to the rights of the parties at common law, or in the absence of the statute.

By the English and American common law, the true owner recovers his land in ejectment, without liability to pay for improvements, which may have been made upon it by an occupant without title. Improvements annexed to the freehold, the laws deems part of it, and they pass with the recovery. Every occupant makes improvements

Blodgett v. Hitt (1871) 29 Wis. 169; *Union Hall v. Morrison* (1873) 39 Md. 281; *Vallé v. Fleming* (1859) 29 Mo. 152 (*semble*); *Hatcher v. Briggs* (1876) 6 Ore. 31; *Preston v. Brown* (1878) 35 Oh. St. 18; *Davis v. Gaines* (1881) 104 U. S. 386, 403-405; *Munsie v. Lindsay* (1883) 10 Pr. R. (Ont.) 173; *Hudgin v. Hudgin* (1849) 6 Gratt. 320; *Sands v. Lynham* (1876) 27 Gratt. 291, 304; *Effinger v. Hall* (1885) 81 Va. 94, 104 (*semble*); *Thomas et al. v. Evans* (1887) 105 N. Y. 601, 611 *et seq.*

In States of Spanish-American origin, the rule of the civil law obtains as explained, by STORY, J., in the principal case. For example, in *Howard v. North* (1849) 5 Tex. 290, 316, it is said: "This principle of equity has been repeatedly recognized by the courts of chancery. It was a well-established rule under the Spanish system of jurisprudence, and its justice should commend its adoption and recognition in all codes and by all courts. In *Dufour v. Camfranc* [1822] (11 Mart. R. 610) the court, having declared a sale by the sheriff void, proceed to say: 'Another question presents itself. It has been proved that proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit until he repay the money. This is the doctrine expressly laid down by *Fabrero*, Lib. 3, cap. 2, sec. 5, n. 357, and we readily adopt it; for nothing can be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts.'

"This principle has been frequently recognized by the decisions in Kentucky. The proceedings in law will, by courts of equity, be treated as valid, though they may be erroneous. But equity will relieve against their consequences, because the rights thereby acquired cannot be retained in conscience. The purchaser will be treated as a trustee and he will not be compelled to surrender until equity is done him (7 Mon. R. 615; 8 Dan. R. 183; 3 *id.* 623)." See also *Gaither v. Hanrick* (1887) 69 Tex. 92; *Harkey v. Cain* (1887) 69 *id.* 146.

Contra: *Haggarty v. McCanna* (1874) 10 E. C. Green, 48.

On the whole subject, see valuable notes in 18 Harv. L. R. 305. and 30 Am. Dec. 177-182.

For the foreign law, see *Bürgerliches Gesetzbuch*, §§ 816-817; French Code Civil, Dalloz, arts. 1379-1381; Italian Civil Code (French translation by Prudhomme), arts. 1148-1150; Spanish Civil Code (Falcón), 1897-1898; Bk. ii, tit. v. on possession. The editions of the Italian and Spanish codes are elaborately annotated with references to European and Spanish-American States.

—Ed.

at his peril, even if he acts under a *bona fide* belief of ownership. 2 Kent. Com. 334. Such is the rigid rule of the common law. It is founded upon the idea that the owner should not pay an intruder, or disseisor, or occupant, for improvements which he never authorized. It is supposed to be founded in good policy, inasmuch as it induces diligence in the examination of titles, and prevents intrusion upon and appropriations of the property of others.

Chancery, borrowing from the civil law, made the first innovation upon the common law doctrine. And it came at length to be held in equity, that when a *bona fide* possessor of property (for equity, no more than law, would aid a *mala fide* possessor) made meliorations and improvements upon it in good faith, and under an honest belief of ownership, and the real owner was for any reason compelled to come into a court of equity, that court applying the familiar maxim, that he who seeks equity must do equity, and adopting the civil law rule of natural equity, would compel him to pay for those improvements or industrial accessions, not the cost indeed, but so far as they were permanently *beneficial* to the estate, and enhanced its value. Story, Eq. Jurisp., 779*a*, 799*b*; Putnam v. Ritchie, 6 Paige, 390; Bright v. Boyd, 1 Story Rep. 478, enriched by the learning and research of that distinguished jurist; S. C. 2 *Id.* 605; Green v. Biddle, 8 Wheat. 77; Willard's Eq. 312; Sugd. on Vend. chap. 22, §§ 54, 55, 57.

This was the extent of relief to *bona fide* possessors. "I have not," says Chancellor WALWORTH, in Putnam v. Ritchie, 6 Paige, 390, "been able to find any case either in this country or in England wherein the Court of Chancery has assumed to give relief to a *complainant* who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights."

Courts of law next modified the strict rule of the common law (which makes the occupant of land which is owned by another, no matter how good the faith of the occupant may be, liable for the rents and profits) to this extent, viz., that where such owner brought his action for mesne profits, which courts of law treated as an equitable action, the *bona fide* occupant might set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no further. Jackson v. Loomis, 4 Cow. 168; Murray v. Gouverneur, 2 Johns. Cas. 438; Green v. Biddle, 8 Wheat. 1, 75, 76; 2 Kent, 335, and cases in note; Putnam v. Ritchie, 6 Paige, 404; Hilton v. Brown, 2 Wash. C. C. R. 165; Davis v. Smith, 5 Geo. 274.

The equity of the *bona fide* possessor who had made lasting and permanent improvements upon lands which turned out to be another's, was so strong and persuasive as to force its recognition to this partial extent by courts of law, without the aid of statute.¹

¹It may therefore be stated generally and broadly that the *bona fide* possessor

GRISWOLD v. BRAGG ET UX.

CIRCUIT COURT OF THE UNITED STATES, 1880.

[48 *Federal Reporter*, 519.]

IN EQUITY. Bill supplementary to an action in ejectment, for the purpose of ascertaining the value of betterments and improvements. On demurrer to bill.

SHIPMAN, J. At the September term, 1879, of this court, the jury rendered a verdict, in an action of ejectment, in favor of the present defendants against the present plaintiff, that they recover the seisin and possession of an undivided fourth part of a tract of land in the town of Chester. Upon motion of the defendant in the ejectment suit, judgment and execution were stayed until further order. He thereupon filed a supplemental bill on the equity side of the court. This bill, after setting out the state statute hereinafter recited, commonly called the "Betterment Act," alleges, in substance, that the plaintiff and those under whom he claims have held said land by a series of connected conveyances since 1846, which deeds purported to convey, and were intended and believed to convey, an absolute estate in fee-simple, and that the plaintiff and his grantors have had uninterrupted possession of said land since 1846, under a like belief that they

will be allowed, for taxes, assessments and improvements made in the honest belief of ownership, whether he derive title through the administrator or executor, as in *Bright v. Boyd*, *supra*, or where the administrator has, without fraud, taken title in himself. *Smith v. Drake* (1873) 23 N. J. Eq. 302; *Laggar v. Mutual Union Loan Assn.* (1893) 146 Ill. 283 (and cases cited), *Henderson v. Ashwood* [1894] L. R. App. Cas. 150, 163. Or through imperfect foreclosure of a mortgage provided the improvements are reasonable and judicious. "*Gillis v. Martin* (1833), 2 Dev. Eq. (N. C.), 470; *McConnel v. Holabush* (1849), 11 Ill. 61; *McSorley v. Larissa* (1868), 100 Mass. 270; *Harper's Appeal* (1870) 64 Pa. St. 315; *Am. Buttonhole Co. v. Burlington Loan Assn.* (1886), 68 Ia. 326. But see *Miller v. Curry* (1889), 124 Ind. 48, in which the doctrine is curiously limited, and compare *Barnett v. Nelson* (1880), 54 Ia. 41" (*Kirchwey's Cases on Mortgage*, 535, note), or in other than mortgage foreclosure. *Jackson v. Loomis* (1825), 4 Cow. 168; S. C. 15 Am. Dec. 347, with elaborate note 349-354; *Wells v. Davis* (1890), 77 Tex. 636; *Duckett v. Duckett* (1891), 21 Atl. 323 (Md.); *Long v. Cude* (1889), 75 Tex. 225; *Booth v. Best* (1890), 75 Tex. 568; *Phillips v. Coast* (1889), 130 Pa. St. 572; *Goodnow v. Moulton* (1879) 51 Ia. 555. Compare, however, *Homestead Co. v. Valley Railroad* (1872) 17 Wall. 153, 166.

As to the *male fide* possessor, see *Green v. Moore* (1892) 44 La. Ann. 855, allowing such possessor reimbursement of necessary expenses for the preservation of the property and an adjustment of his claims for construction and improvements. But compare *Stille v. Shule* (1889) 41 La. Ann. 816. And see *Lane v. Taylor* (1872) 40 Ind. 495.—Ed.

had an absolute estate; and that during this time, and before the commencement of the ejectment suit, improvements of the value of \$10,000 have been made on said land, by said reputed owners, in good faith, and in the like belief; and prays that the present value of said improvements, and the excess of the value thereof over the amount due to the defendants for the use and occupation of said premises, may be ascertained, to the end that the equitable relief provided by said statute may be granted. To this bill the defendants have demurred. Their title became vested in them in 1878.

The statute (Revision 1875, p. 362, § 17) provides as follows:

"Final judgment shall not be rendered against any defendant, in an action of ejectment, who or whose grantors or ancestors have, in good faith, believing that he or they, as the case may be, had an absolute title to the land in question, made improvements thereon, before the commencement of the action, until the court shall have ascertained the present value thereof, and the amount reasonably due to the plaintiff from the defendant for the use and occupation of the premises; and, if such value of such improvements exceeds such amount due for use and occupation, final judgment shall not be rendered until the plaintiff has paid said balance to the defendant; but, if the plaintiff shall elect to have the title confirmed in the defendant, and shall, upon the rendition of the verdict, file notice of such election with the clerk of the court, the court shall ascertain what sum ought, in equity, to be paid to the plaintiff by the defendant, or other parties in interest; and, on payment thereof, may confirm the title to said land in the parties paying it."

The original statute was passed June 26, 1848 (Laws Conn. 1848, p. 48). It plainly appears from the act as passed, and as reproduced in the Revisions of 1849 (section 223) and 1866 (section 281), that the proceeding in the state court, upon the motion of the defendant, after the verdict, is a proceeding in equity.

The question of law which is raised by the demurrer is in regard to the validity of this statute. It is not denied that the statutes of the several states in regard to realty, except when the constitution, treaties, or statutes of the United States otherwise require or provide, which are in conformity with the constitutions of the respective states, are rules of property, and rules of decision in the courts of the United States (*Bank v. Dudley's Lessee*, 2 Pet. 492), and that, if a state legislature has created a right and established a remedy in chancery to enforce such right, such remedy may be pursued in the federal courts, if it is not inconsistent with their constitution (*Clark v. Smith*, 13 Pet. 195; *Ex parte Biddle*, 2 Mason, 472), and that an inability of the federal courts to proceed in the exact mode provided by a state statute need not prevent a party from the benefit of the relief which is intended to be granted, if the modes of proceeding

in courts of chancery are adapted to carry into effect the statute. *Bank v. Dudley's Lessee*, cited *supra*. This is true, although the right which has been established by the local statute is a new right, and one previously unknown to a court of chancery in this country or in England. *Lorman v. Clarke*, 2 McLean, 568; *Bayerque v. Cohen*, 1 McAll. 113. The practice in equity is, in general, except where otherwise directed by statute or by the rules of the supreme court, regulated by the English chancery practice as it existed in 1842, before the adoption of the "new rules." Equity Rule 90; *Badger v. Badger*, 1 Cliff. 237; *Goodyear v. Rubber Co.*, 2 Cliff. 351.

The statute practically impresses upon the land of a successful plaintiff in ejectment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors, in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid. There is a natural equity which rebels at the idea that a *bona fide* occupant and reputed owner of land in a newly-settled country, where unimproved land is of small value, or where skill in conveyancing has not been attained, or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet, in a comparatively newly-organized state, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon this subject, *nemo debet locupletari ex alterius incommodo*, tersely expresses the antagonism against the enrichment of one out of the honest mistake, and to the ruin, of another. It is obvious that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital, but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner.

It is well known that the English law made no provision for reimbursement of expenditures of this kind, as against the owner of the legal title, except by allowing the *bona fide* occupant to recoup the value of his improvements, when he is a defendant in a bill in equity praying for an account of rents and profits. The established theory was that a court of equity should not go any further, and "grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements, by sustaining a bill,

brought by him therefor, against the true owner, after he has recovered the premises at law." *Bright v. Boyd*, 1 Story, 478, 495. Such was the opinion of Chancellor WALWORTH in *Putnam v. Ritchie*, 6 Paige, 390, and such may be taken to be the state of law in this country, in 1841, apart from local statutes, and of the English law then and now. In 1841 Judge STORY decided, in *Bright v. Boyd*, in favor of the power of courts of equity to grant affirmative relief, at the suit of a *bona fide* possessor, against the true owner; and in 1843 restated his opinion, after an additional hearing of the same case. 2 Story, 605. The learned judge thus states his view of the law:

"I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration; and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation."

This opinion of Judge STORY, though often favorably quoted, cannot be considered as the established law of this country, apart from the statute, because it has rarely had occasion to be reviewed, inasmuch as the "Betterment Acts" have become the predominant statutory system of the country. The supreme courts of Missouri, Maryland and Oregon—states which apparently have no statute on the subject—have adopted his views. *Valle's Heirs v. Fleming's Heirs* (1859), 29 Mo. 152; *Union Hall Ass'n v. Morrison* (1873), 39 Md. 281; *Hatcher v. Briggs* (1876), 6 Or. 31.

The theory of the Connecticut statute is that of Judge STORY, that an equitable lien is placed upon the land for the value of the improvements which the *bona fide* occupant has innocently made. Furthermore, the legal owner has his election either to take possession of the land by paying the lien, or to receive, in lieu of the land, the sum which the court shall ascertain to be equitably due him. The owner's title is not forced away from him, but the equitable lien of the occupant is preserved. There is no election on the part of the occupant to keep the land, and thus compel the owner to abandon his title. Neither is any judgment rendered against the owner for the value of the improvements, to be enforced by levy of execution. These two provisions in the statutes of Ohio and Iowa, respectively, were held to be unconstitutional upon the ground that they invaded the rights of private property as secured by the constitutions of the respective states. *McCoy v. Grandy*, 3 Ohio St. 463; *Childs v. Shower*,

18 Iowa, 261. It may be remarked that the original statute of 1848 provided that "the court shall order and decree the balance so found due to be paid." This clause is not found in the present statute, and the amount of the lien cannot, apparently, be collected by levy upon the defendant's property.

The statute is said to be unconstitutional, in that it impairs the effect of conveyances, in violation of the provision of the constitution of the United States (article 1, § 10), which prohibits a state from passing a law impairing the obligation of contracts; and that, as regards pre-existing conveyances or estates, it is contrary to the state constitution, because it deprives a person of his property without due course of law, and deprives him of his right of trial by jury. I do not think that it is necessary to enter into a critical examination of these constitutional provisions. The defendants' suggestions are founded upon a harsh view of the nature of the statute. It does not impair the obligation of any contract between the owner and his grantor, or between the state and the owner. It interferes with no legal title. It interferes with, and is an abridgment of, the right to the immediate possession and beneficial enjoyment of property, as that right existed at common law, and, to that extent, impairs the interest which owners formerly had in lands. It cannot be said to be an unjust or unreasonable limitation of the common-law right of possession, but, on the contrary, the provisions are reasonable. *Society v. Wheeler*, 2 Gall. 105; *Jackson v. Lamphire*, 3 Pet. 280; *Curtis v. Whitney*, 13 Wall. 68; *Welch v. Wadsworth*, 30 Conn. 149.

Discussion upon the constitutionality of this statute has not, apparently, arisen in the courts of this state. An examination of decisions elsewhere upon statutes of this class shows that *Green v. Biddle*, 8 Wheat. 1, decided that the betterment act of Kentucky was unconstitutional, because it was a violation of the compact between Virginia and Kentucky. It may fairly be inferred, from the express views of the court, as given by Judges STORY and WASHINGTON, that it disliked the statute irrespective of the contract, and was not satisfied with its provisions. These *dicta* may properly be read in the light of the decision in *Bank v. Dudley's Lessee*, 2 Pet. 492, in which case no opinion was expressed upon the general principles of the betterment act of Ohio. The constitutionality, with relation to the constitutions of the respective states whose courts gave the decisions, or the justice of statutes similar in substance or in principle to the Connecticut statute, has been learnedly discussed and sustained in the following, among other, cases: *Withington v. Corey*, 2 N. H. 115; *Whitney v. Richardson*, 31 Vt. 300; *Armstrong v. Jackson*, 1 Blackf. 374; *McCoy v. Grandy*, 3 Ohio St. 463; *Ross v. Irving*, 14 Ill. 171; *Childs v. Shower*, 18 Iowa, 261. The constitutionality of the Tennessee statute was condemned in *Nelson v. Allen*, 1 Yerg. 376. Judge CATRON says

that the question of constitutionality did not properly arise in that case, and expresses no opinion upon the point. The demurrer is overruled.¹

JOHN S. WILLIAMS, ADMINISTRATOR, ETC., APPELLANT
v. ROBERT M. GIBBES AND ANOTHER, EXECUTORS,
ETC. ROBERT M. GIBBES AND ANOTHER, EXECU-
TORS, ETC., APPELLANTS v. JOHN S. WILLIAMS, AD-
MINISTRATOR, ETC.

SUPREME COURT OF THE UNITED STATES, 1857.

[20 *Howard*, 535.]

THESE were cross appeals from the Circuit Court of the United States for the district of Maryland. In the report, the first case only will be mentioned; namely, that of Williams against Oliver's executors.

The case was formerly before the court, and is reported in 17 How. 239.

The facts are stated in the opinion of the court.

The decree was for \$9,686.33 in money, and \$19,215.95 in stock, instead of \$22,866.94 in money, and \$32,847.77 in stock, as claimed by the appellant.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland.

A bill was filed in the court below by Williams, the present appellant, to recover of the defendants the proceeds of the share of complainant's intestate in what is known as the Baltimore Company, which had a claim against the Mexican government, that was awarded to it under the treaty of 1839. The proceeds of the share amounted to the sum of \$41,306.41. The history of the litigation to which the award under the treaty gave rise, in the distribution of the fund among the claimants or the assignees composing the Baltimore Company, will be found in the report of four of the cases which have heretofore come before this court, 11 How. 529; 12 How. 111; 14 How.

¹In addition to the authorities cited in principal case, see Cooley's Constitutional Limitations (7th ed.), 550-553, and numerous cases cited in the note.

See also, *Doe v. Roe* (1887) 31 Fed. 97, in which a plea to an action of ejectment, alleging, *inter alia*, valuable improvements and praying that defendant be allowed a sum amounting to the enhanced value of the land by reason of the improvements, was not allowed although especially authorized by the state practice.—Ed.

610; 17 How. 233, 239. That of *Williams v. Gibbes*, in 17 How., contains the report of the present case when formerly here. This court then decided that the claim of the executors of Oliver to the share of Williams was not well founded; that the interest of Williams in the same had not been legally divested during his lifetime; and that his legal representative then before the court was entitled to the proceeds. The decree of the court below was reversed, and the cause remanded for further proceedings, in conformity with the opinion of the court. Upon the cause coming down before that court on the mandate, the defendants, the executors of Oliver, set up several charges against the fund, which it was claimed should be received and allowed in abatement of the amount.

1. For certain costs and expenses to which they had been subjected in resisting suits instituted against it by third parties. The history of these suits will be found in the cases already referred to in this court, and need not be stated at large.

2. For services and expenses of Oliver in his lifetime, in the prosecution of the claim of the Baltimore Company, as its attorney and agent before the government of Mexico, from the year 1825 down to the time of his death in 1834.

The court below allowed to the executors the costs and expenses to which they had been subjected in defending the suits mentioned, and also thirty-five per cent. of the fund in question for the services of Oliver.

The case is one in many of its features novel and peculiar.

James Williams, the intestate, and owner of the share in the Baltimore Company, became insolvent in 1819, and took the benefit of the insolvent laws of Maryland; and in 1825 the insolvent trustee of his estate sold and assigned to Robert Oliver the share in question in this company; and from thence down to the year 1849, Oliver in his lifetime, and his executors afterwards, did not doubt but that a perfect title to the share had passed by virtue of this assignment. In that year the Court of Appeals of Maryland decided, in a case between the executors and an insolvent trustee of Williams, that no title passed to Oliver by this assignment; and as a legal consequence it was held by this court, in 17 How., that the interest remained in Williams at his death, and of course passed to his legal representative, the complainant.

All the services and expenses, therefore, of Oliver, in his lifetime, in the prosecution of the claims of the Baltimore Company against the government of Mexico, and of the litigation since encountered by his executors in respect to the share, have resulted in securing the proceeds of the same to the estate of Williams, the original shareholder. Williams in his lifetime, and his legal representatives since, down till the fund was in court awaiting distribution, had taken no steps for its recovery, nor had they been subjected to any expense. The whole

of the services had been rendered, and expenses borne, by Oliver and his executors; and the question is whether, upon any established principles of law or equity, the court below were right in taking into the account, in the settlement between the parties, these services and expenses. We are of opinion they were.

By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share; as, notwithstanding the assignment by the insolvent trustee, it still remained in Williams. Oliver thereby became trustee instead of owner of the share and of the proceeds, as did also his executors; and they must be regarded as holding this relation to the fund from their first connection with it. In that character the executors have been made accountable to the estate of Williams, and have been responsible since the fund came into their possession for all proper care and management of the same. In defending these proceeds, therefore, against suits instituted by third parties to recover them out of the hands of the executors, they have done no more nor less than they were bound to do as the proper guardians of the fund, if they had known at the time the relation in which they stood to it, and that they were defending it for the benefit of the estate of Williams, and not for that of Oliver. The services rendered and expenses borne could not have been dispensed with, consistent with their duties as trustees.

But it is said that these suits were defended by the executors while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defence was not made in their character of trustees, and cannot, therefore, be regarded as a ground for charging the estate of Williams with the costs of the litigation.

The answer to this view is, that although in point of fact the defence was made under the supposition that the fund belonged to the estate of Oliver, yet in judgment of law it was made by them as trustees and not owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security.

The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned; and the expenses are properly chargeable in his accounts against the estate. 2 Story, Eq. Jur. § 1275.

Another principle which we think applicable to this case is to be found in a class of cases where a *bona fide* purchaser for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner on account of some latent infirmity in the title. It is

well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity. 2 Story, Eq. Jur. §§ 799, 7996; 6 Paige, 403, 404; 1 Story, 494, 495.

A kindred principle is also found in a class of cases where there has been a *bona fide* adverse possession of the property tacitly acquiesced in by the true owner. The practice of a court of equity in such cases does not permit an account of rents and profits to be carried back beyond the filing of a bill. 8 Wheat. 78; 27 E. L. & Eq. 212; 7 Ves. 541; 1 Edw. Ch. 579. This principle is applicable where the person in possession is a *bona fide* purchaser, and there has been some degree of remissness or negligence or inattention on the part of the true owner in the assertion of his rights.

Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser making permanent meliorations and improvements by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law. 6 Paige, 390, 403, 404, 405; 1 Story, 495; 8 Wheat. 81, 82. The Civil Law in this respect is more liberal, and provides a remedy in behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate (cases above), and indeed generally applies the principle in favor of any *bona fide* possessor of property who has in good faith expended his money for its preservation or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself. Touillier, 3 B. tit. 4, c. 1, ss. 19, 20.

Now in the case before us, Oliver in 1825 purchased this share in the Baltimore Company for the consideration of \$2000, its full value at the time. The purchase was made from the insolvent trustee of Williams, who all parties concerned believed had the power to sell and transfer the title. Williams, down till his death in 1836, set up no claim to it; nor did his representative after his death, till August, 1852, when this bill was filed. Oliver and his executors had been in the undisturbed possession, so far as respects any claim under the present right, for the period of twenty-seven years. And although it may be said in excuse for any remissness, and by way of avoiding the consequences of delay, that Williams and those representing him had no knowledge of the defect in the title till the decision of the Court of Appeals of Maryland, it may be equally said, on the other hand, that Oliver and his executors were alike ignorant of it, and had in good faith expended their time and money in recovering the claim against the government of Mexico, and afterwards in defending it against a long and expensive litigation.

It is difficult to present a stronger case for the protection of a *bona fide* purchaser from loss, who has expended time and money in enhance-

ing the value of the subject of the purchase, or a case in which the principle more justly applies that where the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid only when making compensation to the purchaser. We are therefore of opinion that the court below was right in allowing in the account the costs and fees paid to counsel by the executors in the defence of the suits.

In respect to the thirty-five per cent allowed for the prosecution of the claim against the government of Mexico, it stands in principle upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must in a good degree be governed by the usual and customary charges allowed for similar services and expenses. As this claim was prosecuted with others by Oliver when he supposed and believed that he was the owner, and that he was acting on his own behalf and not as trustee for Williams, the rate of compensation must rest upon all the facts and circumstances attending the service; there could have been no agreement as to the compensation. And for the same reason it cannot be expected that an account of the services and expenses was kept, so as to enable the court to arrive with exactness at the proper sum to be allowed, as might have been required if Oliver had been chargeable with notice of the trust. The proofs show that Oliver appointed agents to represent him at the government of Mexico as early as March, 1825, and that these agencies were continued from thence down till his death in 1834; and that during all this time he kept up an active correspondence with them and others, and with our ministers at Mexico, and with his own government, on the subject. The justice of these claims had been acknowledged by the government of Mexico as early as 1823-24, but no provision was made for their payment. They were regarded as of very little value, from the hopelessness of their recovery; and it is perhaps not too much to say, upon the evidence, that in the absence of the vigorous and efficient prosecution of them by Oliver, they would have been worthless. In the result, for the share in question, which was sold in 1825 for \$2000, there was realized from the government of Mexico, under the treaty of 1839, the sum of \$41,306.41. The estate of Williams has never expended a dollar towards recovering it, nor has Oliver ever received any compensation for his services. The amount may seem large, but we cannot say the court below was not warranted in allowing it, upon the proofs in the case of the great service rendered, and of the customary charges in similar cases.¹

¹A portion of the opinion relating to questions of practice has been omitted.—Ed.

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.

Mr. Justice GRIER dissented.¹

THE ISLE ROYALE MINING COMPANY v. JOHN HERTIN
AND MICHAEL HERTIN.

SUPREME COURT OF MICHIGAN, 1877.

[37 *Michigan Reports*, 332.]

TROVER and *indebitatus assumpsit*. The facts are in the opinion.

COOLEY, C. J. The parties to this suit were owners of adjoining tracts of timbered lands. In the winter of 1873-74 defendants in error, who were plaintiffs in the court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth \$2.87½ per cord, and the value of the labor expended by plaintiffs in cutting and placing it there was \$1.87½ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. The declaration contains two special counts, the first of which appears to be a count in trover for the conversion of the wood. The second is as follows² :—

The circuit judge instructed the jury as follows:

“If you find that the plaintiffs cut the wood from defendant’s land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling, and piling the same.” This presents the only question it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the circuit judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obliga-

¹Accord: *Railway v. Pierce* (1904), 98 Mo. 528.—Ed.

²Declaration omitted. The plaintiffs stated in brief that their labor in cutting, splitting, hauling and piling the wood in question enhanced its value by \$2000, and they counted in *assumpsit* for that sum.—Ed.

tion to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: whether, where one in an honest mistake regarding his rights in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, and taking possession of the wood afterwards by the mining company, and its value in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law when one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can he establish in himself any affirmative rights, based upon his unlawful, though unintentional encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another, where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor. The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product: that grapes may be reclaimed after they have been converted into

wine, and grain in the form of distilled liquors. *Silisbury v. McCoon*, 3 N. Y. 379. See *Riddle v. Driver*, 12 Ala. 590. And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than *Wetherbee v. Green*, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of \$25, and converted them into hoops worth \$700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in *Wetherbee v. Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others, if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner.

Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired, nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin.

The judgment of the Circuit Court must be reversed, with costs and a new trial ordered.

The other Justices concurred.¹

2. THE BENEFIT WAS CONFERRED AT REQUEST, BUT NOT IN THE CREATION OR PERFORMANCE OF A CONTRACT.

OSBORN v. THE GOVERNORS OF GUY'S HOSPITAL.

AT GUILDHALL, BEFORE RAYMOND, C. J., MICHAELMAS TERM, 1727.

[2 *Strange*, 728.]

THE plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly as if he did not expect to be paid, but to be considered for it in his will. And the CHIEF JUSTICE directed the jury, that if that was the case, they could

¹Accord: *Gaskins v. Davis* (1893) 115 N. C. 85. See note on this subject in 8 Harv. L. R. 356.—Ed.

not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterwards resort to his action.¹

LIVINGSTON v. ACKESTON.

SUPREME COURT OF NEW YORK, 1826.

[5 *Cowen*, 531.]

ON error for C. P. of Columbia. The action below was assumpsit for work and labor by Ackeston against Livingston; and the verdict and judgment was for the plaintiff, on the facts stated in a bill of exceptions, upon which the writ of error was founded. Those facts were, that Ackeston, a black man, worked for Livingston, from the spring of 1819 till June, 1820, when he sold him to one Benn. That Livingston had bought him of one Ham, as a slave or servant, at \$200; and that he was to serve till he was 28 years old. That he became dissatisfied and procured Benn to purchase him of Livingston. That Ackeston was born of black parents, who kept house and acted for themselves as long ago as 1798, in which year he was born. The parents had before been slaves to one Dings. Ham had also bought Ackeston as a servant till he was 28. He was sold to Livingston at 16 years and 4 months old.

The counsel for the defendant below moved for a nonsuit, on the ground that there was no contract to pay wages, and none could be implied, between the parties. But the motion was overruled.

Curia, per SUTHERLAND, J. The plaintiff, upon the evidence in the case, must be considered as having been a freeman, during the period he was in the service of the defendant. But the defendant purchased him as a slave in perfect good faith, for a large and valuable consideration. The plaintiff supposed himself to have been a slave; and at his own request, was sold by the defendant to a person

¹Accord: *Le Sage v. Coussmaker* (1794), 1 Esp. 187 ("His Lordship [KENYON] added, that the law was well settled, that if the plaintiff had undertaken the several services proved, without any view to a reward, but with a view to a legacy, that he could not set up any demand against the testator's estate, but of that the jury were to decide"); *Lee v. Lee & Welch* (1834), 6 Gill & J. 316; *Mundorff v. Kilbourn* (1853), 4 Md. 459; *Collyer v. Collyer* (1889), 113 N. Y. 442.

But if the services are not gratuitously rendered although nothing be said at the time of the transaction, the mere expectation of a legacy will not bar a recovery. *Baxter v. Gray* (1842), 4 Scott, N. S. 374.—Ed.

whom the plaintiff had induced and procured to purchase him. There is no pretence of an express promise, on the part of the defendant, to pay the plaintiff for his services; and the question is, whether, under the circumstances of this case, such a promise is to be implied. No doubt the services of the plaintiff, having been performed for the benefit of the defendant, with his knowledge and approbation, the law will imply a promise to pay for them, unless it appears they understood that no compensation was to be made. *Jacobson v. Executors of Le Grange*, 3 John. 201. In this case, it clearly appears, that such was the understanding of the plaintiff, as well as the defendant. The plaintiff knew, and admitted, that the defendant had purchased his time, until he was 28 years of age; that he paid 200 dollars for it; that he was entitled to his services. He procured another person to purchase the unexpired term of his services, from the defendant; thereby admitting the defendant's right to sell it. The law, under such circumstances, cannot raise an implied assumpsit.

The case of *Alfred v. Fitz James*, 3 Esp. Rep. 4, is precisely in point. It appeared, in that case, that the plaintiff, a colored man, came over from Martinique with the dutchess of Fitz James, having been born a slave on an estate belonging to her in that Island. There was no contract of hiring for wages; but a witness said the marquis had been heard to promise him wages. *Ld. KENYON* ruled, that up to the time of the promise to pay wages, the plaintiff could not recover, as there was no original contract of service for wages. (And *vid.* 1 Com. on Contr. 227.)

The case of *Cook v. Husted*, 12 John. 188, has no analogy to this. There *Cook* purchased the time of a black girl from one *Israel Pugsley*. She did not, in fact, belong to *Pugsley*, but to *Sarah Husted*, the plaintiff; and the action was brought by her to recover the value of her services while she lived with the defendant. Having shown the slave to be hers, and to have performed services for the defendant, she was, of course, entitled to be paid for them, unless there was something to show the parties understood that no compensation was to be made. There was nothing of that kind in the case; or from which it could be inferred.

Judgment reversed.²

²Accord: *Negro Franklin v. Waters* (1849) 8 Gill, 322.—Ed.

SWIRES v. PARSONS.

SUPREME COURT OF PENNSYLVANIA, 1843.

[5 *Watts & Sergeant*, 357.]

THIS was an action of *assumpsit*, brought by Susan Swires, *alias* Susan Parsons, against the administrators of Isaac Parsons, deceased, to recover compensation for work, labour and service performed for the intestate in his lifetime. The proof was, that the plaintiff had lived for many years with the intestate, and performed the labour and services as alleged; and the witnesses testified that she lived with him as his wife, and was reputed as such.

The opinion of the Court was delivered by ROGERS, J.

We cannot undertake to say that there was error in charging the jury that, under the circumstances in proof, the plaintiff was not entitled to recover. They were right in ordering judgment to be entered for the defendants. The evidence establishes one of two things, either that the plaintiff and intestate were married, or that she was living in a state of concubinage. They lived as man and wife, and were generally reputed to be so, as the witnesses all concur in saying. Either position is fatal to the claim for compensation, unless in the latter case there was super-added proof of a contract of hiring, of which there is not a shadow of evidence. Without this consideration, however meritorious her services may have been in one aspect, the action cannot be sustained. The action of *assumpsit* is founded on contract, either express or implied; and as an express contract is out of the question, the action must be maintained, if at all, on the implied promise. But this cannot be, for if a man work for another merely with a view to a legacy, he cannot afterwards resort to an action on an implied *assumpsit*. In *Osborn v. The Governors of Guy's Hospital*, 2 Stra. 728, where this principle was first ruled, it is said, "The court must consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterwards resort to his action." This principle applies to the case in hand, and has been since recognised in *Little v. Dawson*, 4 Dall. 111; *Jamison v. Executors of Le Grange*, 3 Johns. Rep. 199; to which may be added. *Urie v. Johnson*, 3 Penn. Rep. 212. It is enough for the plaintiff, *primâ facie*, to show labour performed, to raise an implied *assumpsit* to pay for it. But the facts in evidence rebut the implication of a promise, which would otherwise arise; for the relation which they bore to each other is inconsistent with any understanding for compensation. As it is a situation in which she voluntarily placed herself, she must rely upon his bounty for support. She cannot now turn round and rely upon com-

pensation founded on the relation of master and servant. If the woman can maintain suit against the man, cases may occur where the man may, by parity of reasoning, maintain suit against the woman; and it may sometimes be a difficult matter to settle the account between them. A man cannot be made a debtor against his will; and although cases may be readily supposed of great hardship and apparent injustice, as where the woman has been the victim of a base deception, thinking herself married when she is not, yet we cannot yield to such considerations on reasons of, at least, doubtful policy.¹

Judgment affirmed.

LANTZ v. FREY AND WIFE.

SUPREME COURT OF PENNSYLVANIA, 1850.

[14 *Pennsylvania*, 201.]

ERROR to the Common Pleas of *Erie county*.

This was an action of assumpsit, brought by Frey and his wife, against John Lantz, the plaintiff in error, to recover upon an implied assumpsit for the services of the wife of defendant in error, under the following circumstances: The said Lantz married a widow, the mother of the wife of said Frey. The child at the time of the marriage was eight or nine years old; she went with her mother after the marriage, and lived in the family of Lantz, the stepfather, as one of his own children, without any contract whatever. On the part of Lantz, it was alleged that she was fed, clothed, and schooled, the same as his own child, and she worked in the family in the same manner, until she was between eighteen and nineteen years old, when

¹In Louisiana, however, the contrary doctrine exists and seems well established. In *The Succession of Llula* (1892) 44 La. Ann. 161, the court said in affirming a judgment of the lower court: "The plaintiff and her alleged husband entered into an adulterous connection, and the relations between the parties were such that no marriage could have been contracted between them when they first assumed this relationship to each other. The fact that the husband died during this illicit connection cannot give a character to it which it did not have when it was first formed. It continued as it had begun. The fact that he treated the plaintiff as his wife, and introduced her as such in the community, could not destroy or do away with the actual truth of their relationship, nor could it remove from the plaintiff the knowledge that she was a married woman when she deserted her husband and went to live with Llula. She was not in good faith, as she knew that her husband was living and that she could not become the wife of Llula. It was not possible for her to be imposed upon. She was his concubine and can assert her rights only in that capacity. When the relation of concubinage is incidental and is not the motive

she married Jacob Frey. Soon after her marriage, she and her husband, brought this action to recover wages for the time she lived in the family of her stepfather. The court charged the jury that the plaintiffs below were entitled to recover upon the *quantum meruit*; of which charge and instruction of the court, the plaintiff in error complains.

There was evidence on the part of plaintiffs, that the child lived with its uncle until its mother married Lantz; that Lantz said, if she would come and live with him, *he would use her as one of his own children*. That she worked faithfully—was poorly clad—she was not sent much to school; that she worked in the family, like the other children.

On the part of defendant, that she was sick considerable; that she was clothed as other girls in similar circumstances; that she can read.

The opinion of the court was delivered, September 30th, by BELL, J.

The plaintiffs' declaration is upon a contract. In order to recover, they must, consequently, prove an express contract, or show such circumstances as will raise an implied one. The first is not pretended, and we think the evidence discloses facts which preclude the last.

The defendant intermarried with the female plaintiff's mother, after which the child went to reside in the family of her stepfather, until she herself married. By this arrangement, defendant stood in *loco parentis*, and was responsible for the maintenance and education of the child, so long as she continued to reside with him. 2 Kent's Com. 192; *Stone v. Carr*, 3 Esp. Cas. 1; *Cooper v. Martin*, 4 East. 76. Now nothing is better settled than that a child is not entitled to demand wages from a parent, for services rendered after attaining full age, in the absence of express contract, or something equivalent to it (*Walker's Estate*, 3 Rawle, 243; *Candor v. Candor*, 5 W. & Ser.

and cause of the parties living together, the concubine can recover from the estate of the deceased, if it has been enriched by her industry. There is a *quasi-contract* on the part of the deceased to make compensation. Succession of Pereuilhet [1871] 23 An. 294; *Delamour v. Roger* [1852] 7 An. 152."

In the Pereuilhet case, *supra*, the woman acted as nurse and housekeeper as well as concubine, and was permitted to recover on the ground that the services were rendered under circumstances not presumed to be gratuitous. "It is clear," said the court, "from the record in this case, that the estate of Pereuilhet was considerably enriched by the industry and the patient care of the opponent. If he had hired other servants and nurses, the amount coming to the heirs who now resist her claims would have been considerably reduced. We gather from the record as a whole, a *quasi-contract* on the part of the deceased to compensate the opponent for the services mentioned."

See, also, Succession of Morvant (1894) 46 La. Ann. 301; and the case of *Rhodes v. Stone* (1892) 17 N. Y. Supp. 561.—Ed.

513); a principle which embraces also the liabilities of persons whom the law regards as standing in that relation, although connected by no ties of blood. It was upon this ground that *Defrance v. Austin*, 9 Barr, 309, was decided, and a kindred principle ruled the cases of *Little v. Dawson*, 4 Dal. 100, and *Swires v. Parsons*, 5 W. & Ser. 357. In the first of these cases, a minor nephew was not permitted to recover for services rendered to an uncle, who had received him as one of his own family; in the second, there was a similar denial, where the services were rendered in expectation of a legacy; and in the last, a woman who had lived in a state of concubinage, was unsuccessful in her claim to be remunerated from the estate of the man towards whom she had discharged the duties of a wife and housekeeper. Each of these determinations is based on the irresistible presumption, springing from the relation of the parties, that neither of them contemplated remuneration by the payment of wages, and in the impolicy of sanctioning claims not dreamed of at the time of the transaction. This impolicy is peculiarly apparent where the relation of adult protection and infant dependence exists; the latter expecting naught beyond shelter, food, clothing, and education, and the former enjoying, as of course, whatever services the weaker party is able to render. Such was the relative position of these parties; the girl living in the house of her mother's husband as a member of the family, and the husband regarding her as the child of his wife, and not as a menial or hireling.

The general law springing from this condition of things, as I have stated it, was recognized by the court below, in the answer returned to the defendant's point submitted. But the learned president, moved by the imputed neglect of the stepfather in the discharge of the duty he owed to the child, and by the severity of the labor to which he appears, in some measure, to have devoted her, thought the plaintiff might be entitled to recover remuneration for the defendant's remissness and harshness. In indulging this impression, however, the court forgot the action was to recover for services rendered, and not for any supposed neglect of legal duty on the part of the defendant. Whether such an action will lie in a proper case, I will not take it upon me to say, for the simple reason that no such claim is set up here. But I may say that any device, designed to enable the child of a widowed mother to assume towards a second husband the attitude of creditor for services rendered while living in the family as a member of it, ought to be discouraged, because of the results it must inevitably produce. Men will decline to extend their protection and aid to orphan children, at the hazard of being exposed to suits at law on the suggestion of ill-natured neighbors or exacting friends, that the stepchild has been harshly treated or inadequately provided for. Every one of the least experience knows how difficult at best it is to escape such imputations; and should we

permit cynicism to be stimulated by the chances of encouraged litigation, it will be difficult to foresee the extent of evil which may be produced. That one who assumes the office of parent may so grossly violate the duties appertaining to it, as to subject himself to answer at the suit of the injured party, is possible; though I am unaware of any example of such an action. Certainly it will not lie against a natural parent, and many reasons might be urged for extending the same immunity to him whom the law, for many purposes, regards as a father's substitute. But should these be deemed insufficient for his entire protection, it is not to be doubted that to justify legal interference, a very gross case should be clearly established by proof. These speculations are, however, aside from the question presented in this action, which has already been answered adversely to the pretensions of the plaintiffs below.

Judgment reversed and a *venire de novo* awarded.¹

IN *Donahue v. Donahue* (1893), 53 Minn. 460, 461, GILFILLAN, C. J., said:

The evidence was abundant to sustain a finding that, while the plaintiff continued to work for his father after he became of age, there was an agreement between them that the father should pay him for his work. Of course, from the fact alone that the son continued after he became of age, a member of the father's family, working for him apparently as before he became of age, no agreement to pay him for his work would be implied, but the presumption would be that he worked for his support, as while a minor. But the evidence was sufficient to overcome that presumption, and justify a finding that there was an agreement to pay. All that could be required was that it was such as to reasonably satisfy the jury of the fact. It might be indirect or circumstantial; shown by the conduct or conversations of the parties, or admissions by the father.

The statement in the appellant's second request to charge, that "the evidence must be clear, direct, and certain," might have misled

¹*Fitch v. Peckham* (1844) 16 Vt. 150; *Andrus v. Foster* (1845) 17 Vt. 556 (case of foster child); *Sawyer v. Hebard* (1886) 58 Vt. 375 (suit by son-in-law to recover board for mother-in-law); *Mosteller's* (1858) 30 Pa. St. 473; *Thompson v. Stevens* (1872) 71 Pa. St. 161 (housekeeper's case); *Honek v. Houck* (1882) 99 Pa. St. 552; *Page v. Snell* (1880) 59 N. H. 531 (nursing); *Hudson v. Hudson* (1892) 90 Ga. 581 (nursing). See also *Munger v. Munger* (1856) 33 N. H. 581; *Hall v. Hall* (1862) 44 N. H. 293 (a digest of authorities); *Moore v. Moore* (1860) 3 Abb. App. 303; *Bixley v. Sellman* (1893) 77 Md. 494; *Taggart v. Taggart* (1891) 27 N. E. 511 (Ind.); *Marion v. Farnam* (1893) 22 N. Y. Supp. 946; *Fuller v. Mowry* (1893) 18 R. I. 424.—Ed.

the jury to suppose that, to justify a finding that there was such an agreement, it must have been directly testified to by some witness who heard it made, and that part of the charge was objectionable. All there was unobjectionable in the request was in the court's general charge, given clearly, explicitly, in much better terms than are contained in the request.¹

HICKAM v. HICKAM.

COURT OF APPEALS OF MISSOURI, 1891.

[46 *Missouri Appeal Reports*, 496.]

GILL, J.² At the December term, 1889, the plaintiff presented to the probate court of Cooper county, for allowance against the estate of Joseph Hickam, deceased, the following account:

*"The Estate of Joseph Hickam, deceased, To Eda Hickam (colored),
Dr.:*

"To services rendered by said Eda Hickam for the said Joseph Hickam as house and general servant from the eighteenth day of February, 1865, to the twenty-third day of February, 1889, being twenty-four years and five days, at the rate of \$5 per month, amounting in the aggregate to the sum of \$1,440.85."

The case was tried before a jury in the probate court, and judgment rendered for the plaintiff for \$785.29, from which the defendant appealed to the circuit court of Cooper county, where a trial was had before a jury, resulting in a verdict for the defendant, whereupon the plaintiff sued out her writ of error, and brought the case to this court. We make the following brief statement of the facts as set out in counsel's brief upon which plaintiff's demand is based:

¹James v. Gillen (1891) 3 Ind. App. 472.

The principal case may be taken as representing the weight of authority in matters of this kind. The question is simply one of fact, and the plaintiff must establish his claim to remuneration just as in any other case. The household relationship, not the mere relationship of parent and child, as Mr. Keener points out, is the difficulty to be overcome, and in such cases courts are inclined to insist that the claim be based upon a *bona fide* intent to receive compensation at the time the services were performed. Otherwise an afterthought, caused, it may be, by pique or disappointment, would change the legal nature of the act. See Keener's Treatise on Quasi-Contracts, 317 and note, in which the cases are collected and analysed. And see note on this subject in 6 Harv. Law R. 382.—Ed.

²A portion of the opinion, relating to questions of evidence and instructions given and refused, is omitted.—Ed.

Prior to the Civil War and up to the date of the emancipation of slaves in Missouri, the plaintiff was the property of Joseph Hickam, now deceased, who lived in Moniteau county, Missouri, from whence he removed to Cooper county, where he died in the year 1889. At the time of the abolition of slavery in Missouri the plaintiff was about twenty-three years old. From childhood she had been the slave of said Joseph Hickam; had no education, and had had very little intercourse with anyone outside of the family of her owner. She claims (and there is some evidence to sustain her) that during the war and until the death of her "old master," Joseph Hickam, she was not allowed to, and never did, leave his premises except in the company of a member of the Hickam family; that she was not allowed to visit any of her own race, and no colored person, not even her step-father, was allowed to talk to her alone; that she was never permitted to go to church or public gatherings of any kind, and lived in absolute ignorance of the fact that the negroes had been set free, or that she was a free woman, until after the death of her master. Joseph Hickam. During the whole of the time, from the abolition of slavery in Missouri until the death of Joseph Hickam (twenty-four years and five days), she lived and served as his slave in total ignorance of her rights, and without any remuneration or reward for her services, except what she had received while she was in fact a slave, to wit, her food and clothing. The theory upon which plaintiff's claim is based is, that if by fraud, deceit or duress she was kept in ignorance of her rights by the said Joseph Hickam, whereby she was induced to and did render him services, then she is entitled to pay for the same, although he may not have intended to pay her, and she may not have expected to charge for such services.

I. It will be seen by a comparison of plaintiff's refused instruction with the instruction given for defendant, that the trial court declined to adopt the theory that if the negro girl, Eda, was induced by the fraudulent concealment of her rights by the said Joseph Hickam to labor for his benefit without pay, that then she ought to recover the value of such services; *but* held that the plaintiff could not recover, however valuable the services may have been, unless "the jury should believe from the evidence that at the time she was rendering said services she intended to charge Joseph Hickam therefor, and that the said Joseph Hickam understood at the time said services were being rendered that she expected to make said charge." etc. In other words, the jury was advised that, even admitting the charge that Joseph Hickam did by his fraudulent practices hold the said Eda in practical bondage years after the emancipation, and that, in utter ignorance that she was free, the plaintiff performed valuable labor for said Joseph Hickam, yet that there was no implied obligation on him to pay therefor, *because* she, the plaintiff, at the time expected no reward, nor did Hickam expect to pay anything therefor.

We do not understand this to be the law in this character of case. An implied promise does not always depend upon the existence of ~~intention in fact of the one to pay and the other to receive~~. The law frequently affixes a promise to pay even contrary to actual intention. As well expressed by an eminent author: "The law implies from men's conduct and actions contracts and promises as forcible and binding as those made by express words, and such contracts are implied sometimes in furtherance of the intention, or presumed intention, of the parties, and *sometimes in furtherance of justice without regard to the intention of the parties*. Thus a promise to pay for services rendered, or for goods received, or money obtained, will be implied against the wrongdoer who never intended to pay or intended deceptively to avoid payment." 3 Add. on Cont. sec. 1399; 1 Hilliard on Contracts, sec. 20, p. 65.

This same doctrine found practical application in an early decision by our supreme court. *Higgins v. Breen*, Adm'r, 9 Mo. 497. McNally left his wife in a foreign country, came here and solicited the plaintiff, Rosaline Higgins, to marry him; she consented and was married to him, trusting to McNally's false and fraudulent representations that he was single. It was only after the death of McNally that the plaintiff became informed of the truth. She then sued the estate for the value of her services as housekeeper for McNally during the time she had lived with him, and she was allowed to recover, although, of course, while performing the services she in fact expected no compensation. Nor did McNally expect to pay anything. He was held, however, on an implied contract, regardless of the intention of the parties. In point see also, *Negro Peter v. Steel*, 3 Yeates (Pa.), 250; *Boardman v. Ward*, 40 Minn. 399; Wood on Master & Servant, pp. 96, 106, 107, and cases cited. Many of the cases referred to, it is true, were instances of *compulsion*, where the plaintiff was forced to labor for the defendant. However, I can discover no distinction in principle, whether the labor was secured through duress, compulsion or *fraud*. The reason and justice in each case is the same; the law is the same.

The authorities cited by defendant do not militate against the position here announced. The case of *Callahan v. Riggins*, 43 Mo. App. 130, is one of the series in the appellate courts of this state denying the right of a near relative and member of the family to compensation for labor done while a member of the family, unless there was at the time an expectation of the one to give, and the other to receive, pay for such services. It is there held that the ordinary presumption of an agreement to pay for valuable services rendered does not obtain where the parties occupy a family relation. These cases are taken out of the general rule, and have no bearing on the question here.

In *Maltby v. Harwood*, 12 Barb. 473, and other cases relied on by

defendant's counsel, both parties were acting under a mistake. "They alike," says the court in *Maltby v. Harwood*, "thought the plaintiff was bound as an apprentice." It was held there that no implied obligation to pay arose. It is said there, however, that a different rule would hold if the plaintiff had been *compelled* to perform the labor for defendants. I take it the court in the *Maltby case* would have held the defendant liable on a showing that he had secured the services of the plaintiff by falsely and knowingly representing and inducing the plaintiff to believe that he, the defendant, was legally entitled to his labor thus performed.

II. But it is suggested by defendant's counsel that the ignorance, on account of which plaintiff seeks relief, is that of law and not of fact, and hence, under the well-known maxim, *Ignorantia legis neminem excusat*, she cannot complain of the deception alleged to have been practiced by Joseph Hickam. Generally, it is true, a misrepresentation of the law affords no ground of redress; the misrepresentation should relate to a question of fact. However, this harsh and arbitrary rule is not without its exception. All men are not always presumed to know the law. Misrepresentation of the law is sometimes binding on the party who makes it. This is true in transactions between parties occupying fiduciary and confidential relations. "Indeed," it is said, "where one who has had superior means of information professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief as well as if the misrepresentation had been concerning matter of fact. *Bigelow on Fraud*, 488, and cases cited, *Moreland v. Atchison*, 19 Tex. 311. The right to relief seems to be admitted, where "a party should intentionally deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should thereby knowingly take advantage of his ignorance for the purpose of deceiving him." *Abbott v. Treat*, 78 Me. 126. Says Judge NAPTON, in *Faust, Adm'r v. Birner*, 30 Mo. at p. 420: "There may have been gross ignorance and imbecility on one side and a perfect knowledge of the fact and the law on the other; there may have been imposition or undue influence; there may have been circumstances from which the jury might infer fraud," and, therefore, he concluded that the plaintiff in the action might, on a new trial, recover.

Justice STORY thus concludes a recital of exceptions to the above rule that there is no relief from an ignorance of the law. He says: "It is relaxed * * * in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise." 1 Story's Eq., sec. 137; also sec. 120, *et seq.* Conceding, now, for the purpose only of illustrating our contention, that the facts of this case are as put by plaintiff's counsel, that this negro girl was born and raised a slave, ignorant, unable to read, kept under strict surveillance by her master

during and since the momentous year of 1865, and, up to his death in 1889, guarded by watchful eyes, kept within the precincts of the Hickam home and unadvised of the history of the times and the country, and taught to believe that she was still a slave and was the property of Hickam; that her old master kept her in darkness and absolute ignorance all these twenty-four years of the fact that she was free, what an outrage on justice would it be to answer her claim for compensation for valuable services to say to her: "You all the time knew the law of the land, and there is no relief for you." No; the plaintiff's case, as claimed by her, forms an exception to the rule, and, if Joseph Hickam was guilty of this fraudulent suppression of the truth and this misrepresentation to one under his care and control, he cannot now be heard to invoke the maxim of law above quoted.

The judgment will be reversed, and the cause remanded for a new trial. All concur.¹

TURNER & OTIS v. WEBSTER.

SUPREME COURT OF KANSAS, 1880.

. [24 *Kansas*, 38.]

ACTION brought by Webster against Turner and another, partners, to recover for services rendered the defendants. Trial at the January term, 1879, of the District Court, and verdict and judgment for plaintiff. The defendants bring the case to this court. The facts are stated in the opinion.

¹Accord: *Negro Peter v. Steel* (1801) 3 Yeates, 250; *Kinney v. Cook* (1841) 4 Ill. 232. See also, *Boardman v. Ward* (1889) 40 Minn. 399.

Contra: *Negro Franklin v. Waters* (1849) 8 Gill, 322.

Higgins v. Breen (1845) 9 Mo. 497, cited in principal case, holds squarely that a woman living with man in honest belief that she is his wife, may waive the tort and sue his estate in assumpsit for the value of her services during the period of cohabitation. The opinion is elaborate and convincing, based as it is upon *Hambly v. Trott* (1776) Cowp. 371, *ante*. See also, *Fox v. Dawson* (1820) 8 Mart. (La.) 94, in which the recovery was permitted.

Cooper v. Cooper (1888) 147 Mass. 370, is, however, contra, but seems based upon the alleged sanctity of the married relation. See also, *Payne's Appeal* (1895) 65 Conn. 397, where, under reversed facts, the husband was not permitted to recover against the estate of a woman whom he had been induced to marry by her false representation that she was single.

It is universally admitted, however, that the wronged woman has a cause of action and that she may recover against the tort-feasor during his lifetime by an action of deceit, although no action lies against his estate. *Cooper v. Cooper* (1888) 147 Mass. 370, and cases cited; *Knott v. Knott* (1902) 51 Atl. R. 15 (N. J. Eq.).—Ed.

The opinion of the court was delivered by

BREWER, J. In an action commenced by plaintiffs in error, an attachment was issued, placed in the hands of the sheriff, and by him levied upon certain mill property. Pending the attachment proceedings, the sheriff, under direction of plaintiffs in error, employed defendant in error to watch the property; and this action was brought by defendant in error, plaintiff below, to recover for such services. That the sheriff was authorized by plaintiffs in error to employ defendant in error, and that the latter performed the services, are conceded facts. The dispute is as to the compensation. Webster claims that the contract price was three dollars per day, and that it was worth that amount; while Turner & Otis say that they authorized the sheriff to contract for only one dollar and a half a day, and the sheriff says that that was all he promised to pay. The misunderstanding seems to have arisen in this way: After the attachment, Turner & Otis requested the sheriff to find some one to guard the mill. Meeting Webster, he asked him what he would undertake the job for. He replied, one dollar and a half a day, and nights the same. The sheriff understood him to say and mean, one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a day of twelve hours, and the same for the night time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price, the sheriff gave the key of the mill to Webster and told him to go ahead. Now the contention of plaintiffs in error is, that the case turns on the law of agency; that they never personally employed Webster; that the sheriff was only a special agent with limited powers, only authorized to bind them by a contract to the amount of one dollar and fifty cents per day of twenty-four hours; that Webster is chargeable with notice of the extent of the sheriff's authority, and can enforce the contract as against the plaintiffs in error to the extent only of such authority. For any contract beyond that amount, the special agent binds himself alone, and not the principal. On the other hand, the defendant in error contends that where services are contracted for and rendered, and no price stipulated, the law awards reasonable compensation therefor, and that where there is a misunderstanding as to the price, the one party understanding it at one sum and the other at a different, there is no stipulation as to the price, and that it makes no difference whether the contract be made through an agent or with the principal directly. In the case at bar, he contends that it is immaterial that the conversation and misunderstanding were with the sheriff, the agent, and that the rule is just the same as though the talk and misunderstanding had been with Turner & Otis personally.

We think the case rests upon the propositions advanced by the de-

fendant in error. It will not be questioned, that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or compensation. Thus, where shingles were sold and delivered at \$3.25, but there was a dispute as to whether the \$3.25 was for a bunch or for a thousand, it was ruled, that unless both parties had understandingly assented to one of those views, there was no special contract as to price. *Greene v. Bateman*, 2 Woodb. & M. 239. It is said by Parsons, in his work on Contracts, vol. 1, p. 389, that "there is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." Here, Webster never assented to a contract to work for \$1.50 a day. He agreed to do a certain work, and did it; but his understanding was, that he was to receive \$3.00 per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was, that they were to pay but \$1.50 a day. In other words, the minds of the parties met upon everything but the compensation. As to that, there was no *aggregatio mentium*. What, then, should result? Should he receive nothing, because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. So that if the negotiation had been between the parties directly, and this misunderstanding had arisen, the rule of reasonable compensation would unquestionably have obtained. Now, how does the law of agency interfere? The proposition of law advanced by counsel for plaintiff in error, that a special agent binds his principal to the extent only of the authority given, and himself by any promise in excess, is clear. But the agent made no promise in excess of his authority. He promised that which he was authorized to promise. Because the other party misunderstood the extent of the promise, is surely no reason for holding the agent bound for more than he did in fact promise. The agent has rights as well as the principal. The work is not done for his benefit. He has discharged his agency in good faith, and to the best of his ability. Why should he be mulcted in any sum on account of the misunderstanding of the party with whom he contracted? If compensation were given on the basis of his promise, then, if his promise was in excess of his authority, he should be responsible for the excess; but where the promise is ignored, and compensation given on the basis of value alone, he should not be charged with the excess of such value above his authority. An agent is responsible for good faith. That is not questioned. He does not insure, either to his principal or the opposite party. Acting in good faith and to the best of his ability, we can see no reason for making him responsible for any mere mis-

understanding. Justice is done to all parties by ignoring any promise or understanding as to compensation, and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor.

The case was submitted to the jury upon this basis, and while the instruction asked by plaintiffs in error and refused was unquestionably good law in the abstract, and while some criticism might fairly be placed upon one of the instructions given, and upon the answers of the jury to two special questions, we think the main question was fairly presented, and that no error appears justifying a reversal of the judgment, and it will be affirmed.¹

All the Justices concurring.

¹See also, *Tucker v. Preston* (1887) 60 Vt. 473.—ED.

CHAPTER II.

WHERE A CONTRACTURAL RELATION EXISTS, BUT ONE PARTY HAS
FAILED TO RECEIVE AN EQUIVALENT OF HIS OUTLAY.

SECTION I.

THE FAILURE IS DUE TO A MISTAKE.

1. MISTAKE MAY BE AS TO LAW OR FACT.

BONNEL *v.* FOUKE, ALDERMAN OF LONDON.

MICHAELMAS TERM, UPPER BENCH, 1657.

[2 *Siderfin*, 4.]

THE plaintiff being one of the colemeeters of London, for which he was to pay £80 per annum, the special matter was found to be that by divers charters the Kings of England have granted and confirmed to the Mayor and Aldermen of London, the measuring of cloths, as well woollen as linen, silks, etc., and the weighing and measuring of fruit, fish, coals, etc., both in the port of London and on the Thames from Stanesbridge to London bridge, and thence to Medway near the sea, as also upon the river Medway, of all such goods landed upon the banks within the said space before limited; and it was found that in ancient times there were but four colemeeters, and afterwards six were appointed. and later eight. And in the third year of King James it was enacted by the Common Council of London (which has as much power within the walls of London as an act of Parliament without) that there should be ten colemeeters, eight of whom should pay their rent to the Lord Mayor for the time being, for the maintenance of his honorable house, while the other two should pay their rent to the Chamberlain of London. The plaintiff was one of these two. About the year 1652 (as I remember), when the defendant was Mayor, he demanded of the plaintiff the said rent, who paid it quarterly and

holds several receipts of this tenor: Received of J. B., one of the colemeeters of the city of London, the sum of £20 for his rent, by me, J. F., Lord Mayor, etc. Afterwards the rent was demanded of the said defendant [plaintiff?] by the Chamberlain of the city, and he paid the said rent to the Chamberlain, and therefore brought *assumpsit*, namely, *indebitatus assumpsit*, against the defendant Fouke. It was adjudged that the action well lies.

As if one comes to me and says: Pay me my rent, I am your landlord; and I answer: Give me your receipt and you shall have it, and so I pay, and afterwards another who has right comes and demands the rent, and I pay him, I may have *indebitatus assumpsit* against him who gave me the first receipt.

And if I pay money in satisfaction of a duty, and he to whom it is paid has no title to receive it, and so the duty is not satisfied, he to whom the money was paid is thereby indebted to me, and therefore I may maintain an action against him as well as against one who has no title to demand rent.¹

BIZE v. DICKASON AND ANOTHER, ASSIGNEES OF BARTENSHLAG.

KING'S BENCH, 1786.

[1 *Term Reports*, 285.]

THIS was an action for money had and received by the defendants, as assignees of the bankrupt, for the plaintiff's use. Plea, the general issue.

The cause came on to be tried at the sittings after Easter Term, 1786, at Guildhall, London, before BULLER, Justice, when the jury found a verdict for the plaintiff; damages £661 9s. 10d. and costs 40s., subject to the opinion of the Court on the following case:—

That the bankrupt, John Rodolph Bartenshlag, being an underwriter, subscribe policies filled up with the plaintiff's name for his foreign correspondents, who were unknown to the bankrupt.

That losses happened on such policies to the amount of £655 9s. 7d.

¹"By means of the fiction of a promise implied in law, *indebitatus Assumpsit* became concurrent with Debt and thus was established the familiar action of *Assumpsit* for money had and received to recover money paid to the defendant by mistake. *Bommel v. Fouke* (1657) 2 Sid. 4, is, perhaps, the first action of the kind." Ames' *History of Assumpsit*, 2 Harv. L. Rev. 66.—Ed.

before the bankruptcy of Bartenshlag, and were adjusted by him. That a loss on another policy to the amount of £6 0s. 3d. happened before the said bankruptcy, but was not adjusted till after such bankruptcy.

That the plaintiff paid the amount of the losses to his foreign correspondents after such bankruptcy.

That the plaintiff had a commission *del credere* from his correspondents, was made debtor by the bankrupt for the premiums, and always retained the policies in his hands.

That a dividend of 10s. in the pound was declared under the said commission on the 15th of June, 1782.

That at the time of the bankruptcy there was due from the plaintiff to the bankrupt the sum of £1356 0s. 3d. And there was due from the bankrupt for the above losses £661 9s. 10d.

That on the 15th of March, 1782, the plaintiff paid to the defendants the sum of £750, and on the 17th of November, 1785, the further sum of £606 0s. 3d., amounting to £1356 0s. 3d.

And on the 18th November, 1785, the plaintiff proved the said sum of £661 9s. 10d. under the said commission.

That the plaintiff never received any dividend under the commission for or on account of the said losses.

That a final dividend of the effect of the said bankrupt was declared by the said commissioners on the 24th day of January, 1786.

That on the 1st of February, 1786, previous to such dividend being paid, the plaintiff caused a notice to be served on the defendants, purporting that he had paid them the said sum of £1356 0s. 3d. under a mistaken idea, without deducting therefrom the said £661 9s. 10d. for the aforesaid losses on the said several policies subscribed by the bankrupt, for whom he was *del credere* to the said foreign correspondents, and had paid such losses accordingly; and cautioning them against making any dividend until he was paid the said sum of £661 9s. 10d.

That there is now in the hands of the said defendants effects of the bankrupt more than sufficient to satisfy the demand of the plaintiff.

The question for the opinion of the Court is, Whether the plaintiff is entitled to recover in this action? If the plaintiff is entitled to recover in this action the verdict to stand. But if the Court shall be of opinion that the plaintiff is not entitled to recover, then a verdict to be entered for the defendants.

Smith was to have argued for the plaintiff, but *Mingay* for the defendants declined arguing the case.

The Court being of opinion that it came within the principle of the case of *Grove v. Dubois*, 1 T. R. 112; and—

Lord MANSFIELD, Ch. J., said, The rule had always been, that if a man has actually paid what the law would not have compelled him to

pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would otherwise have been barred by the statute of limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action.

*Judgment for the plaintiff.*¹

BILBIE v. LUMLEY AND OTHERS.

KING'S BENCH, 1802.

[2 *East*, 469.]

THIS was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance, in order to recover back £100 which he had paid upon the policy as for a loss by capture to the defendants, the assured. The ground on which the action was endeavored to be sustained was, that the money was paid under a mistake, the defendants not having at the time of insurance effected, disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them, relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but the defence rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question; and therefore it was contended at the trial before ROOKE, J., at York, that the money having been paid with full knowledge, or with full means of knowledge of all the circum-

¹On the question of bankruptcy involved, see *Barber v. Pott* (1859) 4 H. & N. 759. On the question of mistake, see an exhaustive and learned note in 15 American Reports, 171-184, where it is said:

"Finally we repeat that we believe the true rule to be, sanctioned alike by reason and authority, that laid down by Lord MAXFIELD in *Bize v. Dickason* (1786) 1 T. R. 285, that 'if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover back.'"—ED.

stances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprized at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back, was a defence to any action which might have been brought on the policy; and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last term for setting aside the verdict and having a new trial, which was to have been supported now by *Park* for the defendants, and opposed by *Wood* for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment,—

Lord ELLENBOROUGH, C. J., asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued:] The case of *Chatfield v. Paxton*¹ is the only one I ever heard of, where Lord KENYON at *nisi prius* intimated something of that sort.² But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In *Lowrie v.*

¹*Chatfield v. Paxton* was decided in 1799. The elaborate statement of this case printed as a footnote in the original report of *Bilbie v. Lumley*, is omitted inasmuch as the facts are sufficiently given in the opinion of GIBBS, C. J., in *Brisbane v. Dacres* (1813) 5 Taunt. 143, 155, *post*.—Ed.

²"Experienced advocate" and "learned" judge were alike unaware, it would seem, that there were not a few such cases in the books in which no distinction was made between mistakes of law and fact. *Hewer v. Bartholomew* (1598) Cro. Eliz. 614 (mistake of law); *Bonnel v. Fouke* (1657) 2 Sid. 4, *ante* (mistake of fact); *Farmer v. Arundel* (1772) 2 W. Black. 824, *post* (mistake of law); *Bize v. Diekason* (1786) 1 T. R. 285 (mistake of law).

Equity likewise failed to recognize any distinction between mistakes of law and fact before 1802. *Turner v. Turner* (1680) 2 Rep. Ch. *154 (mistake of law); *Lansdowne v. Lansdowne* (1730) 2 J. & W. 205, S. C. *Moseley*, 364 (mistake of law); *Bingham v. Bingham* (1748) 1 Ves. 126 (mistake of law).

In *Lansdowne v. Lansdowne*, *supra*, as reported by *Moseley*, 364, 365, Lord Chancellor KING is reported to have said, and rightly. "That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." And see the valuable discussion of this maxim in Keener's masterly Treatise on Quasi-Contracts, 87 et seq.—Ed.

Bourdieu, 1 Dougl. 467, money paid under a mere mistake of the law was endeavored to be recovered back; and there BULLER, J., observed that *ignorantia juris non excusat*, &c.¹

*Rule absolute.*²

¹A reference to the report of the case will show that the opinion of BULLER, J., in *Lowry v. Bourdieu* (1780) 1 Dougl. 468, 471, was purely *obiter*. The transaction was made illegal by Statute (19 Geo. 2, c. 37); the contract was executed not executory, and both parties stood *in pari delicto*. Ignorance of the law in such a case was irrelevant in a civil, although it would have been material in a criminal proceeding. It was likewise a concurring opinion, not one in which he delivered the opinion of the court. If not *obiter*, it was clearly discredited, if not retracted in *Bize v. Dickason*, *ante*, originally tried before BULLER in 1786, and inconsistent with the unanimous opinion of the Court of King's Bench delivered by Chief Justice MANSFIELD, of which court BULLER was then an honored member.—Ed.

²Lord ELLENBOROUGH seems to have forgotten his distinction between law and fact, for in *Perrott v. Perrott* (1811) 14 East, 423, decided some nine years later, he says (pp. 439, 440):

“Mrs. Territt mistook either the contents of her will, which would be a mistake in fact; or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation. *Onions v. Tyrer*, 1 P. Wms. 345, and 2 Vern. 742, is a strong authority that a mistake in point of law may destroy the effect of the cancellation. And when once it is established, as it clearly is, that a mistake in point of fact may also destroy it, it seems difficult upon principle to say that a mistake in point of law, clearly evidenced by what occurs at the time of cancelling, should not have the same operation.”

From this latter case it seems morally certain that had *Bilbie v. Lumley*, *supra*, been argued and the authorities cited, Lord ELLENBOROUGH would not have delivered his hasty and ill-considered opinion in the earlier case.

In *Elting v. Scott* (1807) 2 John. 157, 165, KENT, C. J., referring to the question of mistake of law, said: “This question has been very ably discussed, and different opinions formed upon it, by the civilians; but it is considered as settled in England by the late case of *Bilbie v. Lumley*; and that decision seems to be in conformity with the doctrine anciently taught in the *Doctor and Student* (pp. 79, 147, 152, 251).”

In a MS. note to this case Mr. Ames says: “Was not the case rightly decided independently of this rule? Defendant acted in good faith. The non-disclosure seems not to have had any bearing on the loss that actually occurred. At least the exemption of plaintiff from liability on the policy would have operated somewhat harshly as between these parties, the defence being allowed for the sake of the benefit of the general rule requiring full disclosure. That is, as between these parties the defence was rather technical than just and, therefore, plaintiff having paid could not equitably recover back the money paid.”—Ed.

SIR CHARLES BRISBANE, KNT. *v.* DACRES, WIDOW,
EXECUTRIX OF ADMIRAL DACRES.

COMMON PLEAS, 1813.

[5 *Taunton*, 144.]

THIS was an action of assumpsit for money had and received, to which the defendant pleaded the general issue, and at the trial of the cause before MANSFIELD, C. J., at the first sittings within Hilary Term, 1813, a verdict was found for the defendant, subject to the opinion of the court on the following case.¹

It appeared that plaintiff was in 1808 a captain in navy attached to the Jamaica squadron under the command of Admiral Dacres, the defendant's testator; that the plaintiff conveyed in his ship, the *Arethusa*, some \$700,000 public money from the West Indies to England, for which service the government allowed him the sum of £850; that he likewise carried \$1,500,000 belonging to private owners, and received as freight therefor the sum of £7438 18s. 5d.; that the plaintiff thereupon paid a portion of the two sums so received by him, namely £2500 (one-third of the sum of £7438 18s. 5d. and £20 7s. 3d. on account of the allowance of £850) in accordance with a former custom of the navy, which had in fact ceased to be legally binding in 1801. On learning this fact the plaintiff brought assumpsit for £2500 as money paid under mistake.²

On this day the judges of the court delivered their opinions *seriatim*.

GIBBS, J., read the warrant. I read this particularly, because it has been contended that the terms of the warrant give the reward to the captains exclusively. I do not know that it is necessary for me to state the correspondence; the sum of it is this, that the Lords of the Treasury proposed to the Lords of the Admiralty that a certain sum should be paid to the commanders of ships of war which should carry dollars; the Admiralty fell into this, and agreed that an allowance should be made to the commanders of such ships as shall carry treasure; the purpose of setting out these letters is, to show that the terms of them apply only to the captains commanding these ships, without any reference to the admirals. The case then states that the payment was made on the behalf and account and with the sanction of the plaintiff, but under an idea that he was bound to pay it under the practice. With respect to the freight of private dollars, we are all agreed; and as Captain Brisbane had no right to carry those dollars at all, and stipulated for and received a freight to which

¹A short statement is substituted for that of the original report.—Ed.

²Arguments of counsel, in which the later opinion of Lord ELLENBOROUGH in *Perrott v. Perrott* (1811) 14 East, 440, was not brought to the attention of the court, omitted.—Ed.

he had no right, and afterwards, in pursuance of an understanding with Admiral Dacres, imparted a part to him in manner agreed on; we are all of opinion, that this carrying of the dollars was an illegal transaction, that the whole which followed was tainted with the same illegality, and that the money paid cannot be recovered at all, inas-much as the captain could not lawfully employ the ship and crew, which ought to be employed in the service of his majesty, in carrying bullion for individuals. I think as to the £20, he cannot recover back the one-third of that. We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise. There are many doubtful questions of law: when they arise, the defendant has an option either to litigate the question, or to submit to the demand and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money. He who received it is not in the same condition; he has spent it in the confidence it was his, and perhaps has no means of repayment. I am aware cases were cited at the bar, in which were *dicta* that sums paid under a mistake of the law might be recovered back, though paid with a knowledge of the facts; but there are none of these cases which may not be supported on a much sounder ground. In the case of *Farmer v. Arundel*, 2 Bl. R. 825, DE GREY, C. J., indeed says: "When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action (of money had and received) will certainly lie." Now the case did not call for this proposition so generally expressed; and I do think, that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least it is not entitled to the same weight in a case where the attention of the court is not called to a distinction, as it is in a case where it is called to the distinction. Now in the very next case cited, *Lowry v. Bourdieu*, Doug. 471, which was so early as 21 G. 3, the distinction is taken. After the other judges, BULLER, J., says: "I am clear that the plaintiff ought not to recover, for there is no fraud on the part of the underwriters: and in a case where there is no mistake of fact, or ignorance of fact,

41 the money cannot be recovered back, for the rule applies, that *ignorantia legis non excusat*." This distinction was thus pointedly stated in the presence of Lord MANSFIELD, who heard it, and whose attention must be called to it; and he at the end of the case guards the world against the conclusion that in no case can money paid on an illegal transaction be recovered back; for in case of extortion, he says, it may. I mention this to show, that although Lord MANSFIELD spoke immediately after BULLER, J., and must have heard and noticed his doctrine, he expresses no dissatisfaction with it. The next case is *Bize v. Dickason*, 1 T. R. 285, an action brought by an insurance-broker to recover back from the assignees of a bankrupt so much of a sum of money which the plaintiff had paid to the assignees for a debt due to the bankrupt, as the plaintiff might have deducted by way of set-off by reason of losses which had accrued before the bankruptcy upon policies effected by the plaintiff and subscribed by the bankrupt. It is most certain that the only question brought under the consideration of the court in that case was, whether the right of the broker, who had a *del credere* commission to make the deduction, ranged itself under the case of *Grove v. Dubois*, 1 T. R. 112, and *Mingay* declined all argument and gave up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might recover back the amount after payment. Lord MANSFIELD mentioned in his judgment many cases where money paid could not be recovered back, although, if it had not been paid, it could not have been enforced; and he concludes by saying, that where money is paid under a mistake, which there was no ground to claim in conscience, it may be recovered back. Mistake may be a mistake of law or of fact; but I cannot think Lord MANSFIELD said "mistake of law;" for Lord MANSFIELD had, six years before, in *Lowry v. Bourdieu*, heard it said, "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and BULLER, J., sate by him, who had expressly stated the distinction six years before in *Lowry v. Bourdieu*, and would not have sate by and heard the contrary stated without noticing it. Lord MANSFIELD's *dictum* is, that money paid by mistake, which could not be claimed in conscience, could not be recovered back; and LAWRENCE, J., doubted, not whether the plaintiff had knowledge of the law, but of the facts; for that although the plaintiff seemed to have been apprized before he paid the bill, of the general outline of his defence, he was not then so conversant with the particular facts now appearing, as to have been able to resist the demand then made on him, if an action had been brought. Here then is, I may say, the ultimate opinion of Lord KENYON, for he first directed the jury it might be recovered back if paid with a knowledge of the facts but without knowledge of the law, which opinion he wholly afterwards abandons. Among all the practitioners of the court of

King's Bench, where questions of this sort very frequently arise on insurance transactions, we were universally of this opinion, that where the money was paid with a knowledge of the facts, it could not be recovered back. One underwriter chose to pay rather than resist, another resisted and succeeded; in all similar cases it would be very easy to say, "I paid this without a knowledge of the law, and therefore may recover it back." Our only question, then, in all cases, was, whether the facts were known. This was the universal practice, till *Billie v. Lumley*, 2 East, 469, occurred: that case was tried at York, before ROOKE, J., who ruled differently: after the report was read, Lord ELLENBOROUGH asked *Wood*, B., then of counsel for the plaintiff, whether he could find any case which would support it; and he cited none. Lord ELLENBOROUGH said he never heard of any, except *Chatfield v. Paxton*, and that it was so doubtful at last upon what precise ground that case turned that it was not reported, and the rule was made absolute for a new trial. Now this was a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know and who was never forward to give up a case which he thought he could support, abandoned it. In *Herbert v. Champion*, 1 Camp. 134, a distinction is clearly taken between an adjustment on a policy, and a payment on the adjustment; and Lord ELLENBOROUGH says, that if the money has been paid, it cannot be recovered back without proof of fraud. I am therefore of opinion this money cannot be recovered back. I think on principle that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back. I think it on principle, and I think the weight of the authorities is so, and I think the *dicta* that go beyond it are not supported or called for by the facts of the cases. *Billie v. Lumley*, I think, is a decision to that effect; and for these reasons, I am of opinion, the plaintiff is not entitled to recover.

CHAMBRE, J. I concur in thinking the money is not recoverable on the payment of the private freight, whether the carriage of the treasure be considered as a legal or as an illegal transaction. If illegal, the money clearly cannot be recovered; if it be legal, the right to carry it must arise from the permission of government; and as the practice has been uniform for the admiral to receive his third part, we must take it that it is a part of the practice, and that the whole practice has had that assent of the government. As to the freight for the carriage of the public property, I think it stands on a different ground, and that the action is maintainable. The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality. I do not think the case of *Chatfield v. Paxton* applies much in this view of the question. I never heard

of the several parts of that case till now, but I think there are sufficient authorities to say this person has paid this money in his own wrong, and that it may be recovered back. In the case of *Bilbie v. Lumley* there was a letter said to have been concealed, that ought to have been disclosed: this letter was shown to the underwriters, and they after reading it thought fit to pay the money. Now there the maxim *volenti non fit injuria* applies: in that case all argument was prevented by a question put by the court to the counsel. I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by BULLER, J., in the case of *Lowry v. Bourdieu*, and cited by the court in *Bilbie v. Lumley*, *ignorantia juris non excusat*; it applies only to cases of delinquency, where an excuse is to be made: I have searched far, to see if I could find any instance of similar application of this maxim. I have a very large collection of maxims, but can find no instance in which this has been so applied. I cannot see how it applies here. In *Lowry v. Bourdieu*, the decision turned on the transaction being illegal, and it being illegal the maxim applied, *in pari delicto potior est conditio defendentis*. *Moses v. Macfarlan*, 1 Bl. R. 219, and a number of subsequent cases decide, that where the plaintiff is entitled, *ex æquo et bono*, to recover, he may recover. In *Farmer v. Arundel*, the opinion of DE GREY is not a mere *dictum*, it is part of the argument, it is a main part of the argument. He there says, where money is paid under a mistake either of fact or of law or by deceit, this action will certainly lie. It seems to me a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it. Suppose an administrator pays money *per capita* in misapplication of the effects of the intestate, shall it be said that he cannot recover it back? It is said, that may be remedied in equity: this is an equitable action, and it would be of bad effect if it should not prevail in like cases. In the case of *Bize v. Dickason*, Lord MANSFIELD held, that if a person has paid that which in conscience he ought, but the payment of which could not be compelled, it shall not be recovered back in an action for money had and received, but that where a man has paid money under a mistake, which he was neither bound in law nor called on in conscience to pay, he may recover it back. Now the case against the plaintiff is not so strong as it has been stated. I do not find in the case that any demand was ever made of him, or any question mooted, upon which he thought it better to submit than to litigate the point. No option ever presented itself to him, and the maxim *volenti non fit injuria* does not apply. It appears to me that the justice of the case with respect to the freight of the public treasure is entirely with the plaintiff. As to the insurance cases that have been cited, a great deal of fabricated law has been newly created within a few years, and the courts have

to decide on difficult and complex cases; but those doctrines must not be carried into the general law, but confined to the occasions which give rise to them. I therefore think the plaintiff may recover as to the £20.

HEATH, J. There are two questions in this case. As to the question whether a payment made under ignorance of the law without ignorance of the facts will enable a man to recover his money back again, it is very difficult to say that there is any evidence of ignorance of the law here; an officer is sent on a profitable service, the admirals are in the habit of receiving a proportion of the officer's recompense, and it is very likely the officer should acquiesce in the demand. He might not like to contest the point with his superior officer. I think a payment made with knowledge that a request would be made, is not distinguishable from the case of an actual demand. Now if money be received without expressing the use to which it is paid, it is received to the use of the payer; but when it is expressed to what use it is paid, that presumption does not arise; here the use was distinctly expressed. *Moses v. Macfarlan* has properly been questioned in many cases, and particularly by EYRE, C. J., and in *Marriott v. Hampton*, 7 T. R. 269. in which the plaintiff sought to recover back the amount of a debt recovered by law from him, whereas he had paid it before; but it was held that the action was not maintainable. That was the case of *judicium redditum in invitum*, but this is a stronger case; for the plaintiff is a judge in his own cause, and decides against himself; and he cannot be heard to repeal his own judgment. Lord ELDON, Chancellor, in *Bromley v. Holland*, 7 Ves. 23, approves Lord KENYON's doctrine, and calls it a sound principle that a payment voluntarily made is not to be recovered back. The plaintiff ought not to recover.

MANSFIELD, C. J. I think in this case the plaintiff ought not to recover. If it was against his conscience to retain this money, according to the doctrine of Lord KENYON, an action might be maintained to recover it back, but I do not see how the retaining this is against his conscience; for how is it claimed? Before 1801, the captains always paid freight to themselves both for private and public treasure, before they paid over the residue of the dollars. At that time it was thought proper that that practice should be discontinued so far as related to the freight of the public treasure; but in order to make captains more attentive to their charge, the Treasury and Admiralty thought it would be proper to make them an allowance, and that was to be paid to the captain by a warrant from the treasury; but so it had before been, when the captain deducted it, that was paid to the captain, and before that a practice had prevailed, one knows not how, but probably by some analogy to the practice of prize-money, that the flag officer, when only one, should be entitled to one-third; when more than one flag officer, they shared it in certain proportions. In

the order which was made for letting them thenceforth be paid by a warrant, instead of deducting the freight themselves, nothing is said about any allowance to be made to admirals; the order is quite silent on the subject of what the captain shall do with the freight when he has it, but the officers of the navy all thinking that they were to proceed as they before did, go on, the one to pay, and the other to receive, as they had done before this alteration, and the admirals receive their share as before; the admiral and captain each thinking that their rights continue as before, the admiral, that he has his accustomed right; the captain, that it is his duty to pay the accustomed share, the one pays and the other receives it. This then being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it?—I find nothing contrary to *æquum et bonum*, to bring it within the case of *Moses v. Macfarlan*, in his retaining it. So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life; he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it? The case of *Farmer v. Arundel* and *DE GREY's* maxim there, is cited; it certainly is very hard upon a judge, if a rule which he generally lays down is to be taken up and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on; but great caution ought to be used by the court in extending such maxims to cases which the judge who uttered them never had in contemplation. If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from this bench. In the case of *Bize v. Dickason*, the money ought conscientiously to have been repaid. There is no other case cited as an authority for the proposition. The maxim *volenti non fit injuria* applies most strongly to this case. *Lowry v. Bourdieu* was the case of a gaming policy. A bond had been given for securing the money lent, which was the only interest intended to be insured; if the plaintiff could have recovered on the policy, he might have recovered the money twice. The insurance was on goods, and he had no interest whatsoever in those goods, otherwise than that if the goods arrived the owner of them would be the better able to pay his debt. The last case is *Billie v. Lumley*. Certainly it was not argued, but it is a most positive decision, and the counsel was certainly a most experienced advocate and not disposed to abandon tenable points. My Brother CHAMBER put the case of an administrator paying away the assets in an undue course of administration. I know not that he could recover back money so paid: certainly if he could, it could be only under the principle of *æquum et bonum*. There being therefore no case which has been argued by counsel, wherein the distinction has been taken,

and in which this doctrine has been held, and as we do not feel ourselves called upon to overrule so express an authority as *Bilbie v. Lumley*, I am of opinion that the defendant is entitled to retain this money. We hear nothing of what is become of the assets in this case; perhaps they may be applied among the next of kin, and dissipated; but what would be the situation of the parties, if, at the end of five years and eleven months, they could be called on to refund in such a case! I am therefore of opinion that there ought to be judgment for the defendant.

*Judgment for the defendant.*¹

¹While *Bilbie v. Lumley* seems to have been the first case in which the distinction in question was taken, it is doubtful if it would have, of itself, settled the law on this subject. The principal case established *Bilbie v. Lumley* and its law for England, and the distinction between mistake of law and fact has since been generally, if not universally, followed in law as well as equity, both in England and in the United States.

For cases in the various jurisdictions, see 15 Am. & Eng. Enc. of Law, (2d Ed.) 1102-1104; 22 *ib.* 628; 39 Am. Digest (Cent. ed.) column 438.

For the eminently sane and equitable doctrine on this subject, obtaining in Louisiana, see La. Civil Code, Art. 1840, and Howe's Studies in the Civil Law, 179-180.

For a discussion of the doctrine, see 2 Evans' Pothier, Appendix 313-346; Keener's Treatise on Quasi-Contracts, 85-112; Mr. Frederic C. Woodward's Money paid under Mistake of Law, 5 Columbia L. Rev. 366-379. And see an article discussing the cases and their doctrine in 18 N. J. Law Journal, 103-107.

Whether the Roman law permitted recovery of money paid through mistake of law is a matter of dispute. The following paragraph states the question clearly and accurately: "In Roman law, a person who, by mistake, paid money which was not due, could recover it by an action known as *condictio indebiti* (*Just.* iii. 27. 6; *Dig.* 12. 6; *Cod.* 4. 5). The right to recover could not be enforced where the money was due under a natural obligation (*Dig.* 12. 6. 51), or where the party making the payment knew at the time that no debt was due (*Dig.* 50. 17. 53). The question whether money paid under a mistake in law, could be recovered by a *condictio indebiti*, has given rise to much controversy among civilians (the opinions of the leading jurists on this subject are collected by Lord MacKenzie in his treatise on *Roman Law*, 6th ed., at p. 256); but the weight of modern authority is in favor of the view that, under Roman Law, money which had been paid by mistake of law, and not of fact, could not be recovered by the *condictio indebiti* (*Savigny, System*, vol. iii. 8. s. 25; *Cod.* 1. 18. 10; 4. 5. 6; *Dig.* 12. 6. 1. 1). Further, every error of fact did not give a claim to restitution, but only such an error as a man, exercising ordinary diligence and prudence, might fall into. (*Dig.* 22. 6. 9. 2; 22. 6. 6.)" 3 Green's En cyc. of Scots Law, 170. See also, 2 Windscheid's Pandekten, § 426; Girard, Manuel de Droit Romain, 612-614.

The two English cases crossed the Tweed in 1830 and either overthrew or threw into confusion the Scotch law. "With regard to error in law, the old rule in Scots law was that a *condictio indebiti* could be enforced by one who had made payments owing to a mistake in law (*Stirling*, 1775. Mor. 2930;

HENDERSON v. THE FOLKESTONE WATERWORKS CO.

QUEEN'S BENCH DIVISION, 1885.

[1 *Times Law Reports*, 329.]

THE plaintiff, the owner and occupier of a house at Folkestone, had been, as he alleged, rated by the water company in excess of what was held to be legal in Dobbs's case in the House of Lords, and he had paid the amount demanded of him under the impression that he was bound to do so, and now he sued the company to recover back the excess. The company, on their side, set up that it was a voluntary payment and not recoverable. The plaintiff set up in answer that it was paid by compulsion. But the Court found as a fact that the payment was voluntary.

Mr. *Henderson* appeared for the plaintiff, and contended that where both parties had contracted under a mistake the money could be recovered. Moreover, he contended that this was really a payment under compulsion. It was, at all events, a payment in ignorance of law. [Lord COLERIDGE.—Of what law? I was ignorant of it before the decision of the House of Lords. I had held the contrary, and two

Carriek, 1778, Mor. 2931; Keith, 1792, Mor. 2933). Subsequently, however, the House of Lords in two cases laid it down in general terms [per Lord BROUGHAM] that it is not relevant for a party, seeking a repetition, to aver that he paid under a mistake in point of law (Wilson & McLellan, 1830, 4 W. & S. 398; Dixons, 1831, 5 W. & S. 445); but the Scots courts have shown considerable hesitation in accepting the dicta in these cases as finally settling the law of Scotland on this matter (cf. Dickson, 1854, 16 D. 586. where doubts are expressed by the Lords President and Ivory as to error in law being in no case a ground for the *condictio indebiti*; see also, Paterson, 1866, 4 M. 706, and Mercer, 1871, 9 M. 618)." 3 Green's Encyc. of Scots Law, 171. See also, Bell's Principles of the Law of Scotland (9th ed.) § 534 n. (K).

In Germany no distinction is taken between a mistake of law and fact: in either case the plaintiff may recover unless he actually knew when he paid that the money was not owed. Bürgerliches Gesetzbuch, §§ 812-814; Dernburg's Bürgerliches Recht, vol. i, p. 434; vol. iii, p. 279.

Nor is the distinction recognized in France: Code Civil (edition of Dalloz) Arts. 1376-1378; Baudry-Lacantinerie & Barde's Droit Civil: Des Obligations, vol. 3, part 3, pp. 1067-1068. But recovery is refused if after payment the defendant has changed his legal position so as to throw loss of the sum on him if recovery were permitted. Code Civil, Art. 1377. This provision is likewise found in the various European and Spanish-American Codes in which the distinction between mistake of law and fact is either unknown or rejected: Italian Civil Code (French translation of Prudhomme), Arts. 1145-1147; Spanish Civil Code (Falcon), Arts. 1895-1901. The editions cited of the Italian and Spanish Codes are annotated and give the law on this subject in European, Central and South American States and Mexico.—Ed.

eminent Judges agreed with me. Can that be put as ignorance of law?¹ Just see what consequences would follow—that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover back money previously paid? The result is not one to be regarded as morally unjust. [Lord COLERIDGE.—It surely is a startling result.] It may be startling to water companies, but to the plaintiff and their other customers it may not seem so. They have been paying the companies excessive charges, and may justly recover them back.

Mr. *Charles*, Q. C. (with Mr. *Kingsford*), appeared for the water company, and pointed out that it was expressly stated that the payment was voluntary, and that the plaintiff had taken no steps to get the charge put right.

The COURT, however, did not require them to argue the case, and proceeded at once to give judgment against the plaintiff.

Lord COLERIDGE said the law was quite clear that the plaintiff could not recover back this money. No doubt when money paid under an error in law had been extorted or obtained by duress or any kind of compulsion it could be recovered back, but that was not the case here. The law once ascertained to have been against the party who had thus by compulsion obtained payment of the money, it can be recovered back. But here at the time the money was paid, which was

The learned judge had good authority for his statement. The catch phrase that every one is supposed to know the law, especially the judge, is a supposition contrary to fact, and is little less than absurd. In *Jones v. Randell* (1774) Cowp. 38, 40, DUNNING, *arguendo* said: "Laws of this character are clearly evident and certain; all the judges know the law." . . . To which Lord MANSFIELD, no mean authority, replied: "It would be very hard upon the profession, if the law was so certain that everybody knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort."

In *Montrion v. Jeffereys* (1825) 2 C. & P. 113-116, ABBOTT, C. J.—a very learned judge—exclaimed: "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."

And in *Martindale v. Falkner* (1846) 2 C. B. 706, 719, Justice MAULE said: "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

And it would seem, in the absence of judicial precedents, that even a professor of law except in rare instances is not within the letter of the maxim.

The maxim does, however, apply in certain cases. As Judge KEENER aptly says: "In a word, then, one cannot by alleging ignorance of law justify the commission of a crime (though if knowledge of law is material, he can show that because of ignorance of law no crime was committed), a breach of contract, or quasi-contract, or the commission of a tort." *Treatise on Quasi-Contracts*, 90.—ED.

before Dobbs's case, the law was in favour of the company, and there was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law. Moreover, in this case the payment was voluntary, and the assessment had been altered as to the future. If the plaintiff desired to dispute the assessment he could have applied to the magistrates to reduce it under the statutory power so to do. The law, however, did not allow money voluntarily paid under a mistake in law to be recovered back.

Mr. Justice A. L. SMITH concurred, and observed that though the amount involved was small the principle involved was important, and the question had been decided in our Courts nearly a century ago. The learned Judge cited two cases to show this,¹ and added that he had never heard it doubted that money paid voluntarily, though under a mistake in law, could not be recovered back.

Judgment for the defendant.

WILLIAM CULBREATH, PLAINTIFF IN ERROR *v.* JAMES
M. AND DANIEL G. CULBREATH, DEFENDANTS.

SUPREME COURT OF GEORGIA, 1849.

[7 *Georgia*, 64.]

OBADIAH M. CULBREATH died intestate, leaving neither wife nor children. His nearest of kin were seven surviving brothers and sisters, and the children of a deceased sister. William Culbreath, the administrator, under a misapprehension of the law, divided the estate equally between the seven brothers and sisters, to the exclusion of the children of the deceased sister. Subsequently, these children instituted suit against the administrator and recovered the one-eighth of the estate.

The present action was by William Culbreath against two of the distributees, to recover back the amount overpaid on account of this mistake.

Upon an agreed statement of the facts in the court below, the presiding judge awarded a nonsuit against the plaintiff, who appealed to this court.

By the Court,—NISBET, J., delivering the opinion. 1. The judgment of nonsuit was awarded by the court below in this case, upon the following state of facts, agreed upon by the parties: "The actions were founded upon a voluntary payment made to each of the defendants by the plaintiff, as administrator of Obadiah M. Culbreath, deceased, of one-seventh part of said intestate's estate, as part of their distributive shares of said estate, in ignorance of the law of

¹*Bilbie v. Lumley, ante, Brisbane v. Dacres, ante.*—Ed.

distribution of estates. After the payments, the children of a deceased sister of the intestate and also of the defendants, in being at the time of the payments, and known and recognized as such children of a deceased sister of the intestate and of the defendants, brought suit against the plaintiff, as administrator aforesaid to recover their distributive share of the estate of said intestate, it being one-eighth of said estate, and did recover. The suits now pending were brought by the plaintiff to recover of defendants their proportion of the overpayment to them." Upon the hearing, the presiding judge nonsuited the plaintiff, with leave to move at the next term, to set aside the nonsuit and reinstate the cases. Which motion being made, was refused, and to that decision the plaintiff excepted.

Upon the hearing before this court, it was conceded on both sides, that with a knowledge of all the facts the plaintiff acted upon a mistake of the law. That was considered as proven. Believing that the defendants were entitled to the whole of the estate of his intestate, to the exclusion of the children of his deceased sister, through a mistake as to the law he paid to them the share which was rightfully due to those children. They having sued and recovered of him their distributive share, he brings these actions to recover of the defendants the money so paid to them, through a mistake of the law. The question is, can a party recover back money paid, with a knowledge of all the facts, through mistake of the law?

We are fully aware that the authorities upon this question are in conflict, as well in England as in this country. Great names and courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true in reference both to principle and authority. It is not surprising, therefore, that Judge ALEXANDER and this court should differ. I think, and I shall try to prove, that the weight of authority is with us. If it were so—if authorities were balanced—we feel justified in kicking the beam, and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing; an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained. In ruling in favor of these actions, we aim at no visionary moral perfectibility. We feel the necessity of practicable rules, by which rights are to be protected and wrongs redressed. We know the necessity, too, of general rules, and how absurd would be that attempt, which seeks to administer the equity which springs from each and every case. The insufficiency which marks all lawgivers, laws, and tribunals of justice, makes that a hopeless thing. Still, where neither positive law nor a well settled train of decisions impose upon courts a prohibition, they are at liberty, nay, bound to respect the authority of natural

equity and sound morality. Where these are found on one side of a doubtful question, they ought to cast the scale. Moreover, we believe that the rule we are about to lay down may be so guarded, as in its application to be both practicable and politic.

It is difficult to say that an action for the recovery of money paid by mistake of the law will not lie, upon those principles which govern the action of assumpsit for money had and received. Those principles are well settled since the great case of *Moses v. Macfarlan*, in 2 Burrow, 1005. The grounds upon which that necessary and most benign remedy goes, are there laid down by Lord MANSFIELD. This claim falls within the principles there settled, and cannot be distinguished from cases which have been ruled to fall within them, but by an arbitrary exclusion. I am not now using the case of *Moses v. Macfarlan* as the authority of a judgment upon the precise question made in this record: although Lord MANSFIELD there held, that money paid by mistake could be recovered back in this action, without distinguishing between mistake of law and fact. I refer to it, to demonstrate what are the principles upon which the action is founded. It is not founded upon the idea of a contract. In answer to the objection, that assumpsit would lie only upon a contract, express or implied, Lord MANSFIELD said, "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon the contract." Again: "One great benefit derived to a suitor from the nature of this action is, that he need not state the special circumstances from which he concludes that *ex æquo et bono* the money received by the defendant ought to be deemed belonging to him."

"The defendant," says his Lordship, farther, "may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it." His summary is in the following words: "In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." In the language of the civilians, from whom Lord MANSFIELD borrowed many valuable principles, "*Hoc natura æquum est, neminem cum alterius detrimento fieri locupletiores.*"

If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another, under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral or honorary or benevolent, between the parties, by the ties of natural justice the payer's right to recover it back is perfect, and the payee's obligation to refund is also perfect,—it becomes a debt. It is a case fully within the range of the *ex æquo*

et bono rule. This is that case. It falls within none of the exceptions mentioned by Lord MANSFIELD. It was not paid as a debt due in honor or honesty, as in case of a debt barred by Statute; it is not paid as a donation; it was not paid as a debt contracted in violation of public law; for example, money fairly lost at play. In all such cases it is conscientious for the defendant to keep it. In this case there is no right or equity or conscience upon which the defendant can plant himself. Why, then, is not the case of a payment by mistake of the law within the principles of *Moses v. Macfarlan*?

Right here the argument might rest on principle. Just here the onus is cast upon the other side, to show how and why this case is distinguishable from other cases falling confessedly within the principles upon which the action for money had and received is based. We shall see upon what footing the distinction is placed by Lord ELLENBOROUGH. It is that of policy. The doctrine which I am now repelling never was defended upon principle; it never can be. No British or American judge ever attempted its defence on principle. It was ruled on policy, and followed upon the authority of a few precedents. A policy which, it must be conceded, does private wrong, for the sake of an alleged public good; or, I should more appropriately say, rather than risk a doubtful public evil. It was, no doubt, this view of the subject which startled the calm philosophical equity of Marshall's mind, when yielding, in *Hunt v. Rousemanier*, to precedent, he still gave in his personal protest against the doctrine. For what he said in that case can be viewed in no other light than as a personal protest. It is wise, it is necessary for courts to yield to established authority; but, inasmuch as the use of precedent is to illustrate principle, a single precedent, or a number of precedents should not control, when they are against principle.

We guard this doctrine by saying, that the action is not maintainable, where money is paid through mere ignorance of the law, or in fulfilment of a moral obligation, or on a contract against public law, or on any account which will make it consistent with equity and good conscience for the defendant to retain it. Nor does the judgment of this court embrace cases of concealment, fraud, or misrepresentation. They depend upon principles peculiar to themselves. And farther, it is scarcely necessary to add that a recovery cannot be had, unless it is proven that the plaintiff acted upon a mistake of the law.

2. There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books, and in the minds of professional men, upon this subject, has grown out of a confounding of the two. It may be conceded, that at first view, the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see that it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness: mistake implies action.

Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff, the administrator, had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea, that being ignorant of the law he is not liable to pay interest on their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance in this case of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake.

The distinction is a practical one, in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas, a mistake of the law, developed in overt acts, is capable of proof, like other facts.

3. The usual reply to all this is the time-honored maxim, *ignorantia juris non excusat*. We do not make void this maxim in any fair construction of it. It is an indispensable rule of legal and social policy: it is that without which crime could not be punished, right asserted, or wrong redressed. What if its application does, in some cases, work injustice? Its overruling necessity, and the vast preponderance of its benefits over its evils, have reconciled the civilized world to its immovable status as a rule of action. The idea of excuse implies delinquency. No man can be excused upon a plea of ignorance of the law, for disobeying its injunctions or violating its provisions or abiding his just contracts. He is presumed to know the law, and if he does not know it, he is equally presumed to be delinquent. I remark, to avoid misconstruction, that it is of universal application in criminal cases. In civil matters, it ought not to be used to effectuate a wrong. That is to say, it cannot be a sufficient response to the claim of an injured person, that he has been injured by his own mistake of the law, when the respondent, against conscience, is the holder of an advantage resulting from that mistake. The meaning, then, of this maxim is this: no man can shelter himself from the punishment due to crime, or excuse a wrong done to, or a right withheld from another, under a plea of ignorance of the law. The maxim contemplates the punishment of crime, the redress of wrong, and the protection of rights. It is not unreasonable so to construe it as to apply it to one who has not only done no wrong and withheld no right, but is himself the injured party, as in this case? The plaintiff has violated no law, withheld no right from the defendants, and in no partic-

ular wronged them; but on the contrary, he has been injured to the extent of the money which they unrighteously withhold from him. In this view of it, too, the public policy of the maxim is sustained. I cannot see that its utility is lessened by this limitation of its application. In the language of Sir W. D. Evans, "The effect of the doctrine is carried sufficiently far for the purposes of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law." 2 Poth. Ob. App. 297.

The distinction between ignorance and mistake of the law, is recognized by Lord ROSLYN in *Fletcher v. Talbot*, 5 Ves. 14; by Lord MANNERS, in *Leonard v. Leonard*, 2 Ball & B. 180, 183; by the Court of Appeals of South Carolina, in *Lawrence v. Bedubien*, 2 Bai. 623; and in the Executors of *Hopkins v. Mazzyk et al*, 1 Hill Ch. 251.

In England, the authorities are pretty nearly in *equilibrio*, yet I must think that the preponderance, taking the cases at law and in equity together, is on the side of the principle which I am laboring to establish. This action for money had and received is an equitable remedy, and lies generally where a bill will lie; decisions, therefore, in Chancery which recognize the principle may be justly held to sustain it. The first case, then, in order of time, is that of *Lansdowne v. Lansdowne*, reported in Moseley, 364, decided by Lord Chancellor KING. That case was this: The second of four brothers died seised of land, and the eldest entered upon it. But the youngest also claimed it. They agreed to leave the question of inheritance to one Hughes, a schoolmaster, who determined against the eldest brother, on the ground that lands could not ascend. Whereupon, the eldest agreed to divide the estate, and deeds were executed accordingly. Lord KING decreed that they should be delivered up and cancelled, as having been obtained by mistake. There is no doubt whatever but the mistake was one of law as to the legal rights of the elder brother. It is a case in point. It is true that it has been greatly criticised. Moseley, the reporter, has been charged with inaccuracy, and was very much in disfavor with Lord MANSFIELD. Indeed, it is said that his Lordship did, on one occasion, order his reports not to be read before him. Yet there stands the case, and if supported by nothing else, it is sustained by its reasonableness. Judge MARSHALL, in referring to it, says, that it cannot be wholly disregarded.

The case of *Bize v. Dickason* was decided by Lord MANSFIELD in the Court of King's Bench. The judgment of the court was delivered as follows: "The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt

which would otherwise have been barred by the Statute of Limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet, the money being paid, it will not oblige the payee to refund it; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again in this kind of action." 1 T. R. 285.

This authority is incontrovertible, and has not been controverted. The case made shows a mistake of law. The mistake spoken of by Lord MANSFIELD could not have been a mistake of facts, because the case exhibits no mistake of facts, but does exhibit a mistake of the law.

The principle was sustained by a decree in *Bingham v. Bingham*, 1 Ves. 126. There the bill was filed on the ground of a mistake in law. The Master of the Rolls said, "Though no fraud appeared, and the defendant apprehended he had a right, yet it was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right." See the note to this case in Belt's Supplement, 79, which shows the mistake to have been one of law. Also recognized in *Turner v. Turner*, 2 Ch. R. 154; in *Leonard v. Leonard*, Ball & B. 171, by Lord MANNERS; by Lord THURLOW, in *Jones v. Morgan*, 1 Bro. C. C. 219; and by Lord ELDON, in *Stockly v. Stockly*, 1 Ves. & Bea. 23, 31; and in *Anchor v. The Bank of England*, Doug. 638.

To these authorities may be added the *dicta* of Lord Ch. J. DE GREY, in *Farmer v. Arundel*, 2 Black. R. 824, who declared, "That where money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie." Of Lord KENYON, in the case of *Chatfield and Paxton* (see Chitty on Bills, 102), and of CHAMBRE, J., in *Brisbane v. Dacres*, 5 Taunt. 157. This judge, arguing the point with great strength, says, "It seems to me a most dangerous doctrine, that a man getting possession of money to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it." He illustrates by putting the very case made in principle in this record. "Suppose," says he, "an administrator pays money *per capita*, in misapplication of the effects of the intestate, shall it be said that he cannot recover it back?"

Opposed to this weight of authority in England, stand the two cases of *Bilbie v. Lumley*, 2 East, 469, and *Brisbane v. Dacres*, 5 Taunt. 157,—in the latter case see CHAMBRE, J., dissenting,—and the *obiter* opinion of BULLER, J.

It is worthy of remark, that Lord ELLENBOROUGH, who presided in *Bilbie v. Lumley*, afterwards in *Perrott v. Perrott*, 14 East, 423, holds language irreconcilable with his opinion in that case. In the latter case, he is reported to say, "Mrs. Territ either mistook the contents of her will, which would be a mistake in fact, or its legal opera-

tion, which would be a mistake in law, and in either case we think the mistake annulled the cancellation." Thus it is manifest that our judgment in this case is not without precedent in the English books.

The authority of *Bilbie v. Lumley* has been followed in this country, by Chancellor KENT, *Shotwell v. Mundy*, 1 Johns. 512; *Lyon v. Richmond*, 2 Johns. 51; 6 Johns. 169, 170, and by the Supreme Court, in *Hunt v. Rousmanier*, 1 Pet. 1. In the same case, however, in 8 Wheat. 215, Ch. J. MARSHALL says, "Although we do not find the naked principle, that relief may be granted on account of ignorance of the law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." The case in 1 Peters, 1, was decided, however, upon other principles than that one now under discussion. The same may be said of the cases in Johnson's Chancery Reports, above referred to. Yet it may not be denied but that the courts there recognize the rule as settled in *Bilbie v. Lumley*. It may be questioned whether the recognition of that authority by the Supreme Court is worth as much as the opinion of Ch. J. MARSHALL, intimated so plainly in the above extract, as to the rule in Chancery. The leaning of Mr. J. STORY, in his Commentaries on Equity, is the same way; and yet he says, "It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake." 1 Story Eq. Jur. § 121.

Why it is that a party may be relieved from the consequences of a mistake of the law, where he gives up his property, under the name of a compromise, and not under other circumstances, it is difficult to see.

Mistake of the law has been held without relief in Illinois, 3 Gilman, 162; in Tennessee, 8 Yerg. 298; in New Jersey, 1 Green Ch. 145; and in Alabama, 9 Ala. 662; and it may be elsewhere, beyond my time for ascertainment.

The contrary was expressly ruled by the Court of Appeals in South Carolina, in *Lowndes v. Chisolm*, 2 McCord Ch. 455, in 1827. This was followed by the great case before the same court in 1832, of *Lawrence v. Beaubien*. I call it great, because of the affluence of learning displayed in the argument by Messrs. Holmes and King on one side, and Pettigru and Bailey on the other, and because of the perspicuous condensation and ability of the opinion of Mr. J. JOHNSON. The doctrine, in all its bearings, is there discussed with extraordinary power, and the court unanimously decided that "A mistake of law is a ground of relief from the obligations of a contract, by which one party acquired nothing, and the other neither parted with any right nor suffered any loss, and which, *ex aequo et bono*, ought not to be binding; and that it makes no difference that the parties were fully

and correctly informed of the facts, and the mistake as to the law was reciprocal; but there must be evidence of a palpable mistake, and not mere ignorance of the law." The case of *Lawrence v. Beaubien* was reviewed in 1833, by the Court of Appeals, in *Executors of Hopkins v. Mazyck* and others, and its doctrines affirmed, 1 Hill Ch. 242. So that in South Carolina the question is definitely settled. So, also, in Massachusetts, in the same way. See *May v. Coffin*, 4 Mass. 342; *Warder v. Tucker*, 7 Mass. 452; *Freeman v. Boynton*, 7 Mass. 488. See, also, *Haven v. Foster*, 9 Pick. 112.

The writers on the civil law are divided as to the question whether money paid under a mistake of the law is liable to repetition. Vinnius and D'Aguesseau hold the affirmative; so Sir W. D. Evans. The argument of the great French Chancellor, D'Aguesseau, is, to my mind, unanswerable. 2 Ev. Poth. App. 308.¹ Pothier and Heineccius maintain the negative; and it is said that the text of the Roman Law is with them. See *Rogers v. Atkinson*, 1 Kelly, 25, 26; *Collier v. Lanier*, 1 Kelly, 238.

Let the judgment of the court below be reversed.²

MANSFIELD, ADMINISTRATOR v. LYNCH AND WIFE.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1890.

[59 *Connecticut*, 320.]

ACTION by the plaintiff as administrator *de bonis non* of the estate of Dennis McLaughlin, to recover of Ann Lynch, one of the defendants and wife of the other defendant, a sum of money paid to her under a mistake by the original administrator of the estate; brought to the City Court of the city of New Haven, and heard before PICKETT, J.

¹The controversy in France was settled in favor of D'Aguesseau. See Touillier, *Droit Civil* (5th ed.) vol. 11, § 63, p. 79; Zachariä, *Französ. Civilrecht* (6th ed.) vol. 2, § 442.—ED.

²The distinction between ignorance and mistake of law still obtains in South Carolina and Georgia. *Lawrence v. Beaubien* (1831) 2 Bailey, 623; *Hutton v. Edgerton* (1875) 6 S. C. 485, but compare *Cunningham v. Cunningham* (1883) 20 S. C. 317; *Adams v. Guerard* (1860) 29 Ga. 651, 673; *Bohler v. Verdery* (1893) 92 Ga. 715. And see Georgia Code, § 3978. The distinction in *Lawrence v. Beaubien*, *supra*, and in the principal case was referred to approvingly in the opinion of Senator Paige in *Champlin v. Laytin* (1837) 18 Wend. 407, 424; but the doctrine was squarely rejected in *Jacobs v. Morange* (1871) 47 N. Y. 57, in which an attorney's mistake of the law was held to be no excuse.

The doctrine of the principal case would seem to be confined to the jurisdiction of South Carolina and Georgia.—ED.

Facts found and judgment rendered for the plaintiff against the defendant Ann Lynch, and appealed by her. The case is fully stated in the opinion.

TORRANCE, J. The record in this case discloses the following facts:

On the first of May, 1888, one McLaughlin died intestate, and in fact insolvent, owing the defendant Ann Lynch four hundred dollars upon a promissory note. On May 14th of that year one Bradley was appointed administrator upon McLaughlin's estate. The court of probate limited a time for the presentation of claims, and within the time all the claims finally allowed against the estate, amounting to \$1,696.44, were presented to said Bradley.

Of the claims so presented Bradley allowed some and disallowed others. Among the claims of general creditors so allowed (amounting in all to \$705.14), was that of the defendant upon said note, amounting with interest to \$424.87. The claims disallowed, amounting to \$991.30, were in fact valid claims against the estate, but none of them were evidenced by any writing signed by the deceased, and Bradley believed they were not valid claims on that account. He also honestly but erroneously believed that he had been advised by the judge of probate to disallow all claims presented against the estate not evidenced by a writing signed by the deceased, and supposed that one of the claims was barred by the statute of limitations.

On these grounds he disallowed these claims and gave the parties notice of the disallowance. After the time limited for presenting claims had expired, Bradley, acting under the belief that the disallowed claims were no longer claims that could be collected out of the estate, and believing that this being so, the estate was solvent, paid the defendant's claim in full, and took the note into his possession, on the 19th of December, 1888.—In so believing and acting he was honestly mistaken, as the court finds, both as to the matters of fact and as to the matters of law.

Afterwards, in May, 1889, certain creditors whose claims had been so disallowed brought suit against Bradley, and thereupon, by the advice of counsel, he represented to the court of probate that the estate was insolvent, and asked that commissioners be appointed to receive and examine all the claims presented. Thereupon, in May, 1889, the court adjudged the estate to be insolvent and appointed commissioners, to whom Bradley in due time presented all the claims against the estate, including those allowed and paid as well as those disallowed by him; all of which the commissioners allowed, and reported their doings to the court on the 28th of July, 1889, which report was duly accepted, and no appeal has been taken therefrom. In the meantime, on July 1st, 1889, Bradley died, and on August 2d, 1889, the plaintiff was duly appointed and qualified as administrator *de bonis non* of the McLaughlin estate.

The estate could at no time in fact pay to the general creditors more

than 31 7-10 per cent. on the dollar, which was the percentage finally found due and ordered to be paid by the court.

Before the present suit was brought the plaintiff demanded of the defendant \$290.18, which was the amount paid to her by Bradley over and above the allowed percentage. This she refused to pay, and thereupon this suit was brought. The defendant received the amount paid to her by Bradley in good faith, believing the same to be justly due, and she had no actual knowledge of the mistakes on the part of Bradley, or of any of the doings of the commissioners or of the court of probate, before the date of this suit, although public notice thereof was given according to law.

The money so paid to her was by her forthwith deposited in her own name in a savings banks, where it has ever since remained, and is a part of the money attached in this suit.

On these facts the court below rendered judgment that the plaintiff recover of the defendant the \$290.18, with interest from December 18th, 1888, when it was paid to her. Whether, upon the facts found, the court erred in so deciding, is the general question presented for our consideration.

From the record it is evident that, in fact and in law, it was the duty of the administrator to pay, and the right of the defendant to receive, only \$134.69; that the administrator by mistake paid her \$290.18 more than she was entitled to receive; and that the loss, if the over-payment cannot be recovered from the defendant, must fall, either upon Bradley's estate or upon the creditors of the McLaughlin estate. Now, whatever view may be taken of Bradley's action in making the over-payment, it seems unjust that the loss should fall upon the creditors, and if Bradley acted in good faith in making it, and did it under a mistaken view of the law or of the facts, or both, it seems hard that the loss should fall on his estate or upon his bondsman.

On the other hand, if the defendant is compelled to repay this amount, she is no worse off than she would have been if no mistake had been made. She retains her *pro rata* share of the assets, and is not legally harmed, for she thus gets all the law would in any event allow her out of the then known assets of the McLaughlin estate, and she still holds a valid claim against the estate for the balance due her. Viewed in this light, it would seem as if the general result arrived at in the judgment of the court below is fair and equitable, and ought not to be disturbed unless the attainment of such a result in a case like the present is forbidden by some stubborn rule or rules of law.

The defendant claims that the judgment below is erroneous on two grounds: first, because on the facts found Bradley himself in his lifetime had no cause of action against the defendant; and second, if he had, still the present plaintiff as administrator *de bonis*

non cannot recover as he now seeks to do upon that cause of action. We will examine these points in their order.

It is claimed that Bradley had no cause of action because his mistake was one of law and not of fact, and because he was guilty of such negligence and laches towards the defendant that no court, either of law or of equity, would have aided him to recover the over-payment.

Bradley paid the defendant's claim in the honest belief that the estate was solvent. But for this belief he would not have paid it in full. It would seem from the finding that this belief arose partly from ignorance of law, and partly from what he mistakenly supposed to be the advice given him by the probate judge, as to the validity of certain claims presented against the estate. He also supposed that one of the claims disallowed was barred by the statute of limitations. It is perhaps not clear from the finding whether the court below regarded the mistake which Bradley made in supposing the estate to be solvent as the result of a mistaken view of law or of fact, or of both combined, nor is the settlement of this question very material.

If we concede what the defendant claims, that the over-payment was the result of a mistake of law with full knowledge of all the facts, still we think, even then, that Bradley upon the facts found would if living have a right to recover the over-payment, upon the principles settled by this court in the case of *Northrop v. Graves*, 19 Conn. 548. In that case the husband of a legatee, as the result of a mistaken view of the law as applied to the construction of a will by the executors, was paid a sum of money to which by law he was not entitled. In the case at bar the defendant, as the result of a mistaken view of the law as applied in the disallowance of claims against an estate by the administrator, has been paid a sum of money to which she was not by law entitled out of the known assets of McLaughlin's estate. It is true that in *Northrop v. Graves* the defendant, at the time the money was paid, knew it was not due under the will, and that this knowledge was an element that entered into the decision of that case, but it was by no means the controlling element.

The court in that case said: "We mean distinctly to assert that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether the mistake be one of law or fact: and this we insist may be done both upon the principles of Christian morals and the common law."

Here are two, and only two, conditions laid down to entitle a plaintiff in such cases to recover. First, the money must be paid by one under a mistake of his rights and his duty, and be such as he is

under no moral or legal obligation to pay. Second, the recipient of the money must have no "right in good conscience" to retain it.

In the case at bar we think the first condition is fulfilled. Bradley was not only under no moral or legal obligation to make the overpayment, but on the contrary it was clearly his duty to retain the money so overpaid and divide it among the other general creditors. This duty he in fact violated solely because of a mistake of law or fact or both, it matters not which.

It is said, however, that the second condition is not fulfilled in the case at bar, because as the estate did in fact owe the defendant the whole sum paid, she has "a right in good conscience" to retain it. In one sense it is true that the estate owed the defendant the amount overpaid, but it is not in any legal or moral sense true that it was the duty of the administrator to pay, or the right of the defendant to receive, her claim in full from the then known assets of the estate. Her right was only to receive her *pro rata* share with the other general creditors, and the unpaid balance still remained a claim in her favor against the estate. If she gets more than this it must be at the expense of the other general creditors or of the administrator. She did in fact get more than she was entitled to solely in consequence of an honest mistake. It is true that when the overpayment was made she had no knowledge of the condition of the estate or of the mistakes of Bradley, but such knowledge on her part is not made one of the conditions of recovery in the case cited, and after she obtained such knowledge she still refused to make the repayment.

Can it then with reason be said she has "a right in good conscience" to retain money which rightfully belongs to the estate, to which she is neither morally nor legally entitled, and which she obtained solely in consequence of an honest mistake which wrought her no harm whatever? Whatever meaning may be given to the somewhat indefinite phrase, "right in good conscience," we think it clear that the defendant had no such right as against Bradley under the circumstances to retain the overpayment, and this fulfills the second condition.

We are aware that upon the general question whether, when all the facts are known, or may with ordinary diligence be known, money paid under a mistake of law may be recovered back, the authorities are in direct conflict, but since the decision of the case of *Northrop v. Graves*, *supra*, there can be no doubt as to the position of this court upon this question in a case like the present. It is unnecessary therefore to cite the decisions of other states upon the question, but if it were many such authorities might be found. Such for instance are the cases of *Culbreath v. Culbreath*, 7 Geo. 64; *Stevens v. Goodsell*, 3 Met. 34; *Rogers v. Weaver*, 5 Hammond (Ohio), 536; *Beatty v. Dufief*, 11 Louis. Ann. 74.

From the case of *Culbreath v. Culbreath*, here cited, which was

decided in 1849, a month or two after our own case of *Northrop v. Graves*, we quote the following (p. 67): "The question is, can a party recover back money paid with a knowledge of all the facts, through mistake of the law? We are fully aware that the authorities upon this question are in conflict, as well in England as in this country. Great names and courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true in reference both to principle and authority. . . . I think, and I shall try to prove, that the weight of authority is with us. If it were not so—if authorities were balanced—we feel justified in kicking the beam and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor for which he paid nothing and for which his neighbor received nothing; an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained."

In the case of *Rogers v. Weaver*, *supra*, the court say (p. 537): "It is an admitted rule that where money has been paid by mistake it may be recovered back in this action. It appears to us that the payment in this case was made under a mistaken understanding of the true situation of the estate. . . . We think it just and equitable, as well as lawful, to infer a promise to repay the sum received more than was due from the fact of its receipt through mistake." The same principle was acted upon in the case of *Bliss v. Lee*, 17 Pick. 83.

But it is further said that Bradley knew all the facts and was guilty of gross negligence and laches in this matter towards the defendant, and that on these grounds he had no cause of action. But it nowhere appears that the defendant has been in any way harmed or injured by the claimed negligence or laches of Bradley. She has not changed her position for the worse on that account. She has her *pro rata* share of the assets now in her hands, and still has a claim for the unpaid balance, even if she is compelled to repay the amount overpaid. If she has given up her note she can undoubtedly easily get it back, and she has in place of it the proved and allowed claim based upon it. We fail to see where she has been legally harmed by Bradley's negligence or laches.¹

Where money is paid under a mistake of fact, it is no defence to an action brought to recover it that the mistake arose through the plaintiff's negligence, if such negligence caused the defendant no harm. *Appleton Bank v. McGilvray*, 4 Gray, 518; *Kingston Bank v. Eltinge*.

¹The balance of the case is important on the question of negligence or laches as a bar to recovery and should be considered in connection with this heading. *post*.—Ed.

40 N. York, 391. We think the same principle should apply in a case like the present, even where the mistake is one of law.

We also think that if the law is as laid down in *Northrop v. Graves* as to payments of money made by mistake of law by a party acting in his own right, much more ought the law to be so held in a case where the party making the payment acts in some fiduciary capacity as the agent of others.

We hold then that Bradley, if living, would upon the facts found be entitled to recover from the defendant the amount overpaid. The next question is whether the present plaintiff is entitled to recover.

If we are right in our conclusion that Bradley, if living, might on the facts found recover from the defendant the overpayment, then upon principle we see no good reason why the plaintiff may not recover in this action.

It is true that the doctrine of the common law is, that between the administrator and the administrator *de bonis non* there is little or no privity, and that to the latter is committed only the administration of the goods, chattels and credits of the deceased which have not been administered. It may also be true perhaps that if Bradley's estate had made good the overpayment to the plaintiff, Bradley's representatives alone would in that case have had the right to bring this suit, but, notwithstanding these and other reasons that might be urged, we think the plaintiff can maintain this action.

Bradley parted with certain assets of the estate to the defendant by an act which, under the facts found, gave the defendant no right to retain them as against Bradley acting as administrator. After the overpayment the money overpaid still remained assets of the estate, and it was Bradley's duty to recover it back for the benefit of the estate as soon as he knew that the estate was insolvent in fact. After Bradley's death the plaintiff became the sole representative of the estate, the trustee of all persons having an interest in it. *Wiggin v. Swett*, 6 Met. 194. It was his duty to take charge of and administer all assets of the estate of the deceased in the hands of the administrator at his decease, or in the hands of third persons, not administered upon. Bradley was, as to the cause of action which he had against the defendant for the overpayment, a trustee for the estate and the other general creditors. Had he in his lifetime instituted a suit to recover the overpayment and then died, the plaintiff by our statute (§ 569) might have entered and prosecuted such suit to final judgment. We think, in a case like the present, he can as well institute a suit himself as to prosecute one brought by his predecessor.

Whether the suit is brought by the administrator *de bonis non*, or by Bradley's representatives, can make little or no difference to the defendant. In the one case she pays back to the estate directly, and in the other indirectly, the amount overpaid. In either case she pays it back. That is the object to be accomplished by either method,

and we think the present method is the simplest and cheapest for all concerned and was properly adopted.

We know of no case and have been referred to none wherein it is decided that the administrator may not recover in a case like the present. On the other hand in *Stevens v. Goodsell*, *supra*, the administrator *de bonis non* was allowed to recover in a case very similar to this. See also *Bliss v. Lee*, 17 Pick. *supra*, where the executor was allowed to recover a payment made to a creditor beyond his *pro rata* share by an executor *de son tort*.

There is no error in the judgment of the court below.¹

¹Connecticut has consistently allowed recovery in the teeth of the maxim. See the following earlier cases: *Northrop v. Graves* (1849) 19 Conn. 548 (a leading case); *Stedwell v. Anderson* (1851) 21 Conn. 139.

"In Kentucky the question has been presented in a variety of cases. Perhaps one of the most interesting is *McMurtry v. Kentucky Central Railway Co.* (1884) 84 Ky. 462. The railway company, having paid a judgment in an action for personal injuries, with interest from the date of its rendition, brought suit to recover the amount paid as interest on the ground that it had been paid under a mistake, the statute providing that judgments for personal injuries, *inter alia*, should not bear interest. In giving judgment for the plaintiff, the court emphasized the fact that there had been no compromise or choice of courses by the company in making the payment.

"When the parties," says HOLT, J., "regard a question of either law or fact as doubtful, and to avoid litigation, and by way of compromise, payment is made, then no recovery can be had; but in the case now before us no question was raised at the time as to the right of the claimant to interest. . . ."

"In other cases in the same jurisdiction recovery has been permitted of meter rent paid by a consumer to a gas company, which, under a proper construction of the contract between the gas company and the city, the company had no right to charge (*Capital Gas Co. v. Gaines* (1899) 49 S. W. 462); of a liquor license fee paid under an invalid ordinance (*Bruner v. Stanton* (1897) 43 S. W. 411); of money paid under an unconstitutional statute (*Board of Trustees v. Board of Education* (1903) 75 S. W. 225); of taxes illegally assessed under a mistake of law (*City of Louisville v. Henning* (1866) 1 Bush. 381). As to taxes, however, it should be noted that it has been held (*Louisville & N. R. Co. v. Commonwealth* (1890) 89 Ky. 531) that when payment can be coerced only by suit, then if payment is made without suit no recovery will be allowed. This seems entirely to disregard the question of mistake, and erroneously to assume that the only possible ground of recovery is that of payment under compulsion of duress."

"In at least four jurisdictions—California, North Dakota, South Dakota and Georgia—the rule has been modified by legislative enactment. In the first three, the statute, after providing that apparent consent is not free when obtained through mistake, and that mistake may be either of fact or of law, defines the latter as

"(1) A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they

HAVEN v. FOSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1829.

[9 *Pickering*, 112.]

ASSUMPSIT for money had and received, and money paid, submitted on a case stated. In 1819, Andrew Craigie, of Massachusetts, died intestate in that state, seised of lands there and in the state of New York, and leaving as heirs the wife of the plaintiff, a niece, and the defendant and two brothers, nephews. The widow took out letters of administration in this state. No letters were taken out in New York. In 1821 the plaintiff and his wife and the three Fosters sold the New York land to one Tufts for twenty-four thousand five hundred and forty dollars, he executing bonds for the purchase money payable equally to the four grantors, and secured by a mortgage on the land to them in undivided fourth parts. In 1824, the bonds were paid, one thousand eight hundred and seventy-five dollars being deducted from each of the amounts payable to the obligees, in order that Tufts might pay the sum of seven thousand five hundred dollars to one Lee, due from Craigie, and for which the lands sold

do not rectify.' Calif. Civil Code, § 1578; N. Dak. Civil Code, § 3854; S. Dak. Civil Code, § 1207; Georgia Code, § 3978.

"The mistake defined in the second clause involves an element of fraud which affords a separate and obvious ground for relief. But the definition in the first clause is of a mistake in the true sense, and is remarkable in that by its terms relief is confined to cases in which the mistake is common to all parties. This is a distinction which has found some favor elsewhere." Mr. Woodward in 5 *Columbia L. R.* 368-371.

In regard to the doctrine of the principal case, other than the question of mistake of law, compare the following from 8 *Viner's Ab.* 423, Pl. 35: "Bill by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the *assets falling short to satisfy the testator's debt*. Decreed that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund, contra to the opinion in 2d *Vent.* 358. *Noell v. Robinson*, and 2 *Vent.* 360; *Hodges v. Waddington*, per *JEKILL*, M. R.; *Ms. Rep. Pasch.* 4 *Geo. Canc. Davis v. Davis*." S. C. 2 *Eq. Ab.* 554, pl. 13.

And note the following cases: *Livesey v. Livesey* (1827) 3 *Russ.* 287; *Dibbs v. Goren* (1849) 11 *Beav.* 483; *In re Horne* (1904) *L. R.* [1905] Ch. 76 (and note on this case in 18 *Harv. L. R.* 546); *Findlay v. Trigg* (1887) 83 *Va.* 539; *Beaird v. Wolf* (1887) 23 *Ill. App.* 486; *Edgar v. Shields* (1856) 1 *Grant*, 361; *Paine v. Drury* (1837) 19 *Pick.* 400; *Heard v. Drake* (1855) 4 *Gray*, 514; *Flint v. Valpey* (1881) 130 *Mass.* 385; *Brooking v. Farmer's Bank* (1885) 83 *Ky.* 431.—Ed.

to Tufts had been mortgaged as security. The contract between Craigie and Lee was for the loan progressively of fifteen thousand dollars for which said lands were mortgaged. Craigie had received four thousand nine hundred and fifty-seven dollars under the contract, and his administratrix two thousand two hundred and thirty-five dollars, which, with interest to June 15, 1820, made the seven thousand five hundred dollars. By agreement of June 17, 1820, the intended loan was reduced to seven thousand five hundred dollars. At the time Tufts undertook to pay this debt to Lee it was barred by the statute of limitations. It had been agreed originally between the heirs and the administratrix, by reason of certain stock in the commonwealth belonging to the estate and received by the heirs, that this Lee debt should be paid out of the proceeds of the stock. But the stock remaining unsold when Tufts proposed to pay the debt, the heirs agreed to pay the same, the administratrix agreeing that the payment by them should have the same effect as if it had been made by her, there existing doubts as to the sufficiency of the personalty to pay the debts of the estate. Tufts neglected to pay Lee. He thereupon foreclosed his mortgage and obtained a decree, which was satisfied out of about half of the premises. Tufts subsequently paid to the defendant the amount which he had retained to discharge Lee's debt.

Other lands in New York were sold by the plaintiff and wife and the Fosters, the consideration being divided equally. And all the times of this and the other above-mentioned transactions, the heirs were ignorant of the law of New York by which lands descended *per stirpes* and not *per capita*. This action was brought to recover the excess received by the defendant above the sum which he was entitled to under the laws of New York.¹

The opinion of the court was drawn up by

MORTON, J. [After stating some of the facts.] By the statute of distributions of this State these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this State, or indeed than the civil or common law, these heirs inherited *per stirpes* and not *per capita*. So that the estate in New York descended, one-half to the wife of the plaintiff, and the other half to the defendant and his two brothers; being one-sixth instead of one-quarter to each.

Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff, having discovered the mistake, now seeks by this action to reclaim of the defendant one-third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now sub-

¹Statement of the case is taken from 19 American Decisions, 353-354.—Ed.

mitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount.

Had the parties been informed of their respective rights under the laws of New York, it cannot be doubted that the plaintiff would have retained one moiety of the land in that State, or would have received to himself one-half of the consideration for which it was sold. The distribution of the avails of the sale was made by the heirs upon the confident though mistaken supposition, that they were equally entitled to them. They acted in good faith upon a full conviction that they were equal owners of the estate. It turned out, however, to the surprise of all of them, that they owned the estate in very unequal proportions, and that the defendant and his brothers had received not only the price of their own estate, but also the price of a part of the plaintiff's estate.

Equity would therefore seem to require, that the defendant should restore to the plaintiff the amount received for the plaintiff's estate. It was received by mistake, and but for the mistake would not have come to the defendant's hands. If the whole estate had been owned by the plaintiff, and the defendant, having no interest in it, had received the whole consideration, the equitable right of repetition would have been no stronger; it might have been more manifest.

The suggestion that the provisions of the New York statute are in themselves inequitable, is no answer to this view of the case. Whether the law of descent in that State is more or less reasonable and just than ours, it is neither our province nor desire to inquire. All statute regulating the descent and distributions of intestate estate may be considered as positive, and in some degree, arbitrary rules. And when a person, by inheritance or purchase, becomes lawfully seised of any estate without fraud or fault on his part, it would be as inconsistent with sound ethics, as with sound law, to divest him of it because the rule of law by which he held it was deemed unreasonable. And if, by accident or mistake, another should get possession, it is not easy to see upon what principle he would be justified in retaining it.

In the case at bar, the division of the consideration money was made by the agreement of all the parties interested. The defendant received the money with the plaintiff's consent. But it was an implied, rather than express agreement.

The defendant also received the money under a claim of right. The defendant believed himself to be legally and equitably entitled to one-quarter part of the proceeds of the sale. And under this belief he claimed it as being rightfully due to him, and the plaintiff, under the influence of the same belief, assented to the justice of the claim, and agreed to the equal distribution which was made.

It was not however paid to the defendant by way of compromise. No controversy existed between the parties. There was not even a difference of opinion between them in relation to their respective pur-

parties in the estate before it was sold, or to the apportionment of the avails after the sale. There was therefore no room for concession on the one side or the other, and nothing between them which could be the subject of compromise.

Nor do the facts furnish any ground to presume that the plaintiff intended to grant anything to the defendant, or to yield any of his legal rights. *Nemo presumitur donare*. And we have no reason to believe that the plaintiff intended to give away any part of his own property, or his wife's inheritance.

The mistake in the distribution of the consideration money for which the land was sold, arose from the mutual ignorance of the law of descents in New York. Can this mistake be corrected and the plaintiff be restored to the rights which he had under this statute?

It is in the first place objected, that the plaintiff's ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve.

In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negligence. Knowledge cannot be imputed to the plaintiff, and it is expressly agreed that he, as well as the defendant, was entirely ignorant of the statute of New York. Besides, it was as much the duty of the defendant as of the plaintiff, to be acquainted with the laws of New York. And if either is guilty of negligence, both are, in this respect, *in pari delicto*.

The objection that the title to real estate cannot be tried in this form of action, cannot avail the defendant; because it seems to us very clear, that no title is or can be drawn in question, in the present case.

The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.

It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim *Ignorantia juris quod quisque tenetur scire, neminem excusat*. This objection has been strongly urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all the authorities applicable to the point, from the civil as well as the common law, have been brought before the court.

Whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable

perplexity. We do not court the investigation of it, and before attempting its solution, it may be well to ascertain, whether it is necessary to the decision of the case before us.

That a mistake in fact is a ground of repetition, is too clear and too well settled to require argument or authority in its support.

The misapprehension or ignorance of the parties to this suit related to a statute of the State of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Stark. Ev. (Metcalf's Ed.) 568; *Male v. Roberts*, 3 Esp. 163. If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. *Kenny v. Clarkson*, 1 Johns. 385; *Frith v. Sprague*, 14 Mass. 455; *Consequa v. Willings*, Pet. C. C. 229. The laws of other States in the union are in these respects foreign laws. *Raynham v. Canton*, 3 Pick. 293.

The courts of this State are not presumed to know the laws of other States or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this State.

That the *lex loci rei sitæ* must govern the descent of real estate, is a principle of our law with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other States.

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition. And whether *ignorantia legis* furnishes a similar ground or repetition, either by the civil law, the law of England, or the law of this Commonwealth, it is not necessary for us to determine. The examination, comparison, and reconciliation of all the conflicting *dicta* and authorities on this much discussed question is a labor which we have neither leisure nor inclination to undertake.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He therefore has in his hands money which *ex aquo et bono* he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands.

The action for money had and received, which for its equitable properties is ever viewed with favor, is the proper remedy for its repetition. The mode in which the payment was originally secured by bond and mortgage forms no objection to the recovery, inasmuch as the money was in fact paid before the action was commenced. The plaintiff's remedy will extend to all the money actually received by the defendant beyond his legal proportion of the estate. Whether it shall extend further, is a question involved in some difficulty.

The estate in New York, at the decease of the intestate, was under mortgage. This mortgage was satisfied from the estate itself, and the amount thus paid deducted from the consideration money. The plaintiff now contends that this incumbrance ought to have been removed by a payment from the personal estate, or if that was insufficient, from the real estate in this Commonwealth.

In the consideration of this question, it must not be forgotten that the plaintiff can recover only what in equity and good conscience is due to him. What descended to the heirs in New York? The estate there, not free from all incumbrances, but with this mortgage upon it. Did equity require that the defendant and his brothers should advance three-fourths of the money to pay off this mortgage, that the plaintiff might have one-half the estate increased in value by this payment?

The mortgagee relied entirely upon his lien on the estate; otherwise he would have demanded payment of the administratrix, and sought a remedy against her upon the personal security of the intestate. This he omitted to do until the claim was barred by the statute of 1791, c. 28. The only sure remedy then remaining was upon his mortgage. This remedy he resorted to, and obtained from the land mortgaged satisfaction of his debt, by a sale of part of it according to the laws of New York.

It is true that before this claim against the estate was barred by the statute of limitations, the heirs agreed with the administratrix that the debt should be paid out of the proceeds of a sale of certain corporate stock. But the stock was not sold so as to make the payment, and after the demand was barred the heirs made an agreement with the purchaser of their estate in New York, that he should retain enough of the consideration which was then due to them to remove this incumbrance, deducting an equal amount from each bond. After the deduction of this amount from the bonds, the balances were paid to the obligees, and thus the bonds were satisfied and discharged. The

effect of this arrangement by the heirs was, to leave the estate in the hands of the purchaser in the same situation it would have been had it been sold subject to this incumbrance.

It must be presumed that the heirs stipulated to remove the incumbrance or to furnish the purchaser with the means of doing it. If this was not the case, they voluntarily agreed to relinquish a part of the purchase-money. In this event it was equivalent to a reduction of the price of the estate, and the plaintiff can have no claim to any more than one-half of the price which was finally agreed upon and actually paid.

If the heirs agreed to pay off this mortgage, it was a part of the agreement that it should be paid out of a particular fund. As this agreement was made by the plaintiff under the mistaken supposition that he owned but a quarter, when in fact he owned half of it, he claims to be relieved from its operation. If the agreement is invalid in part, it must be so in the whole. The plaintiff cannot be released from it and the defendant be bound by it. If the plaintiff, with a knowledge of his rights, would not have agreed to pay out of this fund; so the other heirs, with the same knowledge, would not have agreed to pay at all. They would have relied upon their statute bar, and left the mortgagee to his remedy on the mortgaged estate and their grantee to his remedy against his grantors or in resisting payment of his bonds.

Although this agreement was founded in misapprehension, yet as it was made in good faith and has been executed, as the parties cannot be restored to the situation they were in when it was made, and as the effect of annulling it as to one would be manifest injustice to the other, we can see no good reason why both should not be bound by it.¹

Upon a view of the whole case, it is the opinion of the court, that the plaintiff recover one-third of the whole amount received by the defendant on account of the sale of lands in New York, with interest from the service of the writ.²

¹A portion of the opinion not relating to the question of mistake has been omitted.—Ed.

²See also *Bentley v. Whittemore* (1867) 18 N. J. Eq. 366. The doctrine of the principal case is universally accepted in England and the United States. *Leslie v. Baillie* (1843) 2 Y. & C. C. C. 91; *Imperial, &c., Assieuratrice of Trieste v. Funder* (1872) 21 W. R. 116 (where *JAMES, L. J.*, said that a mistake as to foreign law was a mistake of fact, and was not a reason for setting aside the reward); *Norton v. Marden* (1838) 15 Me. 45, 46, in which *SHEPLEY, J.*, says:

“Certain principles in relation to this action [of money had and received] seem now to be well settled. Money paid under a mistake of law cannot be reclaimed. *Dougl.* 471; *Bilbie v. Lumley*, 2 East, 469; *Stevens v. Lynch*, 12 East, 38; *Brisbane v. Dacres*, 5 Taunt.

THE BANK OF CHILLICOTHE v. DODGE.

SUPREME COURT OF NEW YORK, 1850.

[8 *Barbour*, 233.]

THIS was an action of assumpsit. The declaration contained the ordinary counts for money lent and advanced, paid, laid out and expended, money had and received, an account stated, and five special counts. The plaintiffs were a body corporate duly incorporated in Ohio, and in October, 1839, discounted defendant's bill of exchange

144; *Mowatt v. Wright*, 1 Wend. 355. But a mistake of a foreign law is regarded as a mistake of fact. 9 Pick. 112. Nor can it be reclaimed, when voluntarily paid with a knowledge or means of knowledge in hand, of the facts. *Martin v. Morgan*, 1 Brod. & Bing. 289; *Welsh v. Carter*, 1 Wend. 185. Nor where there may be a mistake of the facts, if the party paying has derived a substantial benefit from such payment; because he is not then entitled *ex æquo et bono* to reclaim it. *Taylor v. Hare*, 4 B. & P. 262. But when paid under a mistake of facts, and without any laches on the part of the payer, and without any substantial benefit derived from it, it may be recovered back. *Hern v. Nicholls*, 1 Salk. 289; *Cox v. Prentice*, 3 M. & S. 344; *Milnes v. Duncan*, 6 B. & C. 671; *Garland v. Salem Bank*, 9 Mass. R. 408."

Nor does the rule extend, it would seem, to mistakes of private and special statutes: *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149; *Beauchamp v. Winn* (1873) L. R. 6, H. L. 223; *State v. Paup* (1852) 13 Ark. 129; *King v. Doolittle* (1858) 1 Head. 77.

And see, *Pitcher v. Turin Plank Road Co.* (1851) 10 Barb. 436; *Webb v. City Council of Alexandria* (1880) 33 Gratt. 168; *Rogers v. Walsh* (1881) 12 Neb. 28.

It is interesting to note that International Law is not treated as foreign law. "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations," per STRONG, J., in *The Scotia* (1871) 14 Wall, 170, 188. See also *The Paquette Habana* (1899) 175 U. S. 677, 700.

In the instructive case of *Hanley v. Donoghue* (1885) 116 U. S. 1, 4, Mr. Justice GRAY, speaking for a unanimous court, said: "No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. *Talbot v. Seaman*, 1 Cranch, 1, 38; *Church v. Hubbard*, 2 Cranch, 187, 236; *Strother v. Lucas*, 6 Pet. 763, 768; *Dainese v. Hale*, 91 U. S. 13, 20. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State. . . . Upon principle, therefore, and according to the great preponderance of authority [citing numerous cases, which see], whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact."—Ed.

of \$5,000, and advanced the further sum of \$4,928.33. The defendant's bill was illegal by the statute of New York, and on suit brought, the defendant, among other defences, set up the said illegality.

The court overruled all the objections and denied the motion, for the reason that if the fact was as the defendant insisted, that the paper was illegally issued and void, yet, as the plaintiffs, who were non-residents of the state, paid to the defendant himself a full and valuable consideration for it, without notice of its illegality, they might recover, on the common counts, the money they paid the defendant for it, with interest. To this decision the defendant excepted. The testimony being closed, the court charged the jury that the defendant having insisted that the bill of exchange was illegally issued, without authority, and was fraudulent and void, and the proof showing that the plaintiffs paid \$4,928.33 for it in money, in good faith, they were entitled to recover that sum, with the interest on it; that residing in a foreign state they would not be presumed to be acquainted with the banking laws of this state. The defendant's counsel excepted, and the jury found a verdict for the plaintiffs for the amount of the draft, with interest. And the defendant, upon a case, moved for a new trial.¹

By the Court. JOHNSON, J.² If the justice who held the circuit was right in his view of the case, the recovery of the money advanced by the plaintiffs to the defendant was proper. There could be no recovery upon the instrument, and no demand or notice of any kind was necessary. If his view was erroneous, a new trial must be granted, of course. The paper negotiated by the defendant to the plaintiffs, upon which the money was advanced, was a time draft issued by the Farmers' Bank of Seneca County, an incorporated banking institution, payable three months after date, to the order of the defendant. The defendant's counsel, upon the trial insisted, and the judge held, that this paper was issued by the bank without authority and was void, and that no recovery could be had upon it. This position was clearly right. The statute forbids such paper to be issued, and it was utterly fraudulent and void. No person, by any act, could give validity or vitality to it as commercial paper, anywhere. And so are all the cases. *Leavitt, receiver, v. Blatchford* and others, 5 Barb. Sup. C. R. 9; Affirmed in court of appeals, 3 Comst. 19. So far the judge ruled as requested by the defendant's counsel. But the justice went farther, and instructed the jury that as this paper was made void by an act of our state legislature, of which the plaintiffs being non-residents of the state, were not bound to take or supposed to have notice, and as they had in good faith advanced to the defendant the money upon it, they were entitled to recover the money thus

¹Statement of facts is shortened.—Ed.

²Part of the opinion dealing with another question is omitted.—Ed.

advanced. To this part of the charge the defendant's counsel excepted. In this I think the learned justice was entirely correct. The defendant was a resident of this state, and chargeable with a knowledge of all legislative enactments here. The law imputes to him knowledge that this paper, negotiated by him, was utterly void and worthless—no better than mere blank paper. The money was then advanced and paid to him without consideration. It was advanced in Ohio, and the plaintiffs are a corporate body of that state. They are not presumed to have notice of our statutes. The statutes of our state are only brought to the notice of courts and citizens of that state by proof. Had it been shown that the plaintiffs, or the officers of the bank, had actual knowledge of the statute in question, they might, notwithstanding their non-residence, be placed upon the footing of persons mutually dealing in illegal transactions. But there is no such question here. It is not pretended that officers of the bank had any knowledge in fact of our statute. The cause was evidently tried upon the assumption that the money was advanced upon the draft, in good faith, by the plaintiffs, supposing it to be good. No question of that kind was raised at the trial.

The plaintiffs then stand in precisely the same situation as though the money had been paid by them under a mistake as to material facts. Ignorance of the law of a foreign government is ignorance of fact—and in this respect the statute laws of the other states of this union are foreign laws. *Haven v. Foster*, 9 Pick. 112; *Norton v. Marden*, 3 Shepley, 45. And this proceeds upon the principle that foreign laws are matters to be proved, like other facts, before even courts can notice them.

It is an elementary principle that money paid under a mistake of material facts, where the party paying derives no benefit from it, may be recovered back.

New trial denied.

COUNTY OF ALLEGHENY *v.* GRIER.

SUPREME COURT OF PENNSYLVANIA, 1897.

[179 *Pennsylvania State*, 639.]

ASSUMPSIT to recover from the controller of Allegheny county \$1,290.32, alleged to have been paid to him by mistake in excess of his salary as fixed by law. The defendant demurred to the statement for the following reasons: (1) at the date of the payments mentioned in the plaintiff's statement the salary of the office of controller of Allegheny county was not payable under the act of May 7, 1864, entitled, "An act relating to Allegheny County;" (2) the

salary of said office at that time was as fixed in the general act, approved May 11, 1881, P. L. 21, and entitled a supplement to an act entitled "An act to carry into effect section 5, of article 14 of the constitution, relative to the salaries of county officers and the payment of fees received by them into the state or county treasury, in counties containing over 150,000 inhabitants and approved the 31st day of March, 1876, amending section 13 of said act;" and under said act the salary of the controller was \$4,000; (3) in any event the payments made to this defendant and sued for were voluntary payments; (4) the statement does not set forth any legal cause of action against this defendant.

The court entered judgment for the plaintiff on the demurrer.

Error assigned was in entering judgment for plaintiff as above.

Opinion by Chief Justice STERRETT, January 4, 1897:

The principle which underlies the construction heretofore given the act of 1876 and its supplements is too plain for question. The constitution had declared that in counties of a specified class, their officers should be paid by fixed salaries; and the legislature sought by that act to accomplish this purpose. It accordingly struck down all prior acts which provided for the payment of such officers in fees as being necessarily inconsistent with the constitutional mandate; and hence *McCleary v. County*, 163 Pa. 578, and allied cases; and left those acts which provided for the payment of fixed salaries, because consistent; and hence *Bell v. County*, 149 Pa. 381. The operation of the act was limited by the accomplishment of its purpose. The act of 1861 being in entire harmony with the constitutional intent, it would have been vain and useless to have stricken it down. The act of 1864 which fixed the controller's salary belongs to the same category, and hence the court below was clearly right in holding that the present case is not distinguishable, in this respect, from *Bell v. County*, *supra*. The act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was therefore illegal. So on grounds of public policy, the court was right in holding that the maxim *volenti non fit injuria* has no application to the illegal payment of public funds to a public officer,—more especially where as here it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust funds that he had been a party to the devastavit. There could be no retention by color of right: *Abbott v. Reeves*, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved; and the authorities are accordingly numerous to this effect. *New Orleans v. Finnerty*, 27 La. Ann. 681; *Com. v. Field*, 84 Va. 26; *Day Land & Cattle Co. v. State*, 68 Texas, 526; *Am. Steamship Co. v. Young*, 89 Pa. 191; *Taylor v. B'd of Health*, 31 Pa. 73; *Smith v.*

Com., 41 Pa. 335, and cases cited. It is obviously immaterial whether the illegal payment be through design or mistake; for in either event the result must be not only misuse of trust funds, but what is of far more importance, demoralization in the service. The only practical difference lies in this: that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received, fidelity to the government, which he represents and is sworn to support, makes restitution a duty. Even a tenant may not question his landlord's title, and much less may a public servant, that of his sovereign. He can plead neither laches nor estoppel in pais to a suit for malversation. Public office is a public trust; the sanctity of public property is essential to its due administration; and necessarily implies a remedy for every diversion from legitimate use. The attributed effect of the filing and advertisement of the controller's annual report, so far as relates to his salary, is without merit. The report is given the "effect of a judgment against the real estate of the *officer who shall thereby* appear to be indebted to the county:" but the act of 1861 does not contemplate that the controller shall become "indebted." He has no power to handle public funds. He is the fiscal officer of the county and, as such, it is his duty to take notice of illegal disbursements of the public funds, and charge the officer who is guilty of misappropriation. This is the only protection the people have against the illegal acts of those who have charge of their pecuniary interests. *Commissioners v. Lycoming Co.*, 46 Pa. 496. Chosen by the people to watch and take care of these interests, it cannot be expected that they shall in turn keep a watch on him.

The suggested hardship of compelling the controller to refund is more specious than real. The adoption of the constitutional provision marked a radical change of policy and should have put him on his guard. As the fiscal officer of the county he was bound to take notice that the construction of the act of 1876 was open to question, and that without the aid of the courts he must act at his peril. His responsibility is not answered by the plea of inconvenience. The county would soon fall into a condition of hopeless insolvency if the "retarding friction" of personal inconvenience were once recognized as a principle of defence to the enforcement of its duties. It follows that there is no error in the judgment, and it is therefore affirmed.¹

¹"It has frequently, *Wis. Cent. Ry. Co. v. United States* (1896) 164 U. S. 190; *Barnes v. Dist. of Col.* (1887) 22 Ct. of Cl. 366; *Ellis v. Bd. of Auditors* (1895) 107 Mich. 528; *Heath v. Albrook* (Iowa, 1904) 98 N. W. 619; *County v. Grier* (1897) 179 Pa. 639; *Bd. of Supervisors v. Ellison* (1875) 59 N. Y. 620; *Com. v. Field* (Va. 1887) 3 S. E. 882, though not uniformly, *County v. Rundall* (1880) 43 Mich. 137; *Painter v. Polk Co.* (1890) 81 Iowa, 242; *Peo. v. Foster* (1890) 133 Ill. 496; See also *Morgan Park v. Knopf* (1902) 199 Ill. 444, been decided that the rule of no recovery does not extend, or at least 'does not have so general application,' to the case of the payment of

GILLIE v. GRANT.

SUPREME COURT OF NEW YORK, 1897.

[23 *Appellate Division*, 596.]

APPEAL by the defendant, Hugh J. Grant, as receiver of the St. Nicholas Bank of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of October, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerks' office on the 14th day of October,

money by public officers or public agents. The reason generally offered for this limitation is the importance of protecting the public funds and the interests of the community. But in some of the cases, where the *defendant* is a public officer or agent, stress is laid upon the fiduciary relation existing between the parties, or between the plaintiff's principal and the defendant. *Ellis v. Bd. of Auditors* (1895) 107 Mich. 528; *Bartlett v. United States* (1839) Dav. 9, 24 Fed. Cases, 1021. As it was put in the case of *County v. Grier* (1897) 179 Pa. 639:

"Fidelity to the government which he represents and is sworn to support, makes restitution a duty."

"In still other cases it is contended that the reason for allowing a recovery is that the mistake of an agent is not chargeable to his principal. *Board of Supervisors v. Ellis* (1875) 59 N. Y. 620. A curious combination of all three notions is found in the opinion in the United States Court of Claims case of *Barnes v. District of Columbia* (1887) 22 Court of Claims, 366, 394, quoted with approval by the United States Supreme Court in *Wisconsin Central Railway v. United States* (1896) 164 U. S. 190.

"The doctrine,' says the court, 'that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money when nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved.'

"In Iowa a distinction seems to be recognized between cases in which the particular payment sought to be recovered is within the general scope of corporate powers and is merely unauthorized but not prohibited by law, and cases in which the payment is clearly beyond the corporate powers or in direct violation of law. In the former class relief is denied, *Painter v. Polk Co.* (1890) 81 Iowa, 242, in the latter granted, *Heath v. Albrook* (1904) 123 Iowa, 559. Some such distinction is suggested also in the opinion of the Supreme Court of Illinois, in *People v. Foster* (1890) 133 Ill. 496, but in the *dicta* of later cases it is disregarded. *Morgan Park v. Knopf* (1902) 199 Ill. 144"; Mr. Woodward's *Money Paid Under Mistake of Law*, 5 Columbia L. Rev. 372, 373.—Ed.

1897, denying the defendant's motion for a new trial made upon the minutes.

This action was brought to recover money received by the defendant as the proceeds of an execution sale against the George C. Treadwell Company. In January, 1894, the plaintiff brought an action against the company, in which a warrant of attachment was issued to the sheriff of Albany county. On January 9, 1894, a levy was made under this warrant and property set apart for the satisfaction of the plaintiff's claim. The following day a warrant of attachment against the company was issued in an action brought by the defendant, and on January 11, 1894, a levy was made under this warrant, and property set apart for the satisfaction of the defendant's claim. The property attached under the plaintiff's warrant was sold under an execution subsequently issued upon a judgment obtained by him in the action, but proved insufficient to satisfy such judgment. Plaintiff thereupon moved in Albany county to compel the sheriff to sell the property held under the defendant's warrant and apply the proceeds upon the plaintiff's judgment. This motion was denied at Special Term on February 12, 1895, and the order was affirmed by the General Term of the third department in the following March. In January, 1896, the Court of Appeals reversed these orders and granted the motion. In the meantime, in July, 1895, the sheriff, not being stayed from so doing, sold the property held under the defendant's warrant and paid over the proceeds to him. After the decision of the Court of Appeals, a motion was made by the plaintiff to compel the defendant to pay him the amount received from the sheriff. The order entered upon this motion on May 26, 1897, withheld decision as to the plaintiff's right to compel payment, but granted him leave to bring an action to recover the amount. In pursuance of this order the present action was begun.

BARRETT, J. There are two grounds upon which the judgment in this action should be sustained: *First*, a party's right to follow property upon which he has a lien into the hands of one who has received the property with knowledge of that lien, and who is not a *bona fide* purchaser for value; *second*, the well-recognized exception to the general rule that money paid under a mistake of law cannot be recovered back, namely, where the money is so paid to an officer of the court.¹

The plaintiff's right to recover upon the second proposition above stated is equally clear. A plain intimation to this effect was given by the Court of Appeals in deciding that a case for restitution under section 1323 of the Code of Civil Procedure had not been made out. *Gillig v. George C. Treadwell Company*, 151 N. Y. 556. Upon this intimation the plaintiff applied in this department

¹The discussion of the first point is omitted.—ED.

for an order requiring the receiver to pay over the money to him; but decision upon the application was, to quote the language of the order, "withheld," and, instead of granting the relief asked, the court gave Gillig leave to bring this action. We think the court might well have afforded the plaintiff the summary relief which he asked, and, there being no dispute about the facts, the delay and expense of an action seem to have been unnecessary. The rule that money paid under a mistake of law cannot ordinarily be recovered back is entirely inapplicable to the present state of facts. This action is not against the sheriff, nor is it brought in the right of the sheriff. It is brought in the plaintiff's own right to recover money, to which he is entitled, from one who has possession of it without right. But even if the money had been paid by the sheriff to Gillig, and the latter, under a misconception of his legal rights under the statute, had paid it over to the receiver, an action to recover it back would lie, for the general rule is subject to the limitation that money paid under a mistake of law to an officer of the court can be recovered. In *Ex parte James*, 9 L. R. (Ch. App. Cas.) 609, Lord Justice JAMES applied this limitation to a trustee in bankruptcy with the observation that the general rule "must not be pressed too far." There a creditor had received money to which he was actually entitled under an execution sale against the bankrupt. He paid this money over to the trustee under the mistaken supposition that the latter was entitled thereto as matter of law. "I am of opinion," said Lord Justice JAMES, "that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." This decision was followed in *Ex parte Simmonds*, L. R. (16 Q. B.) 308, where Lord ESHER observed that, although the court will in general permit an individual litigant to do a "shabby thing," namely, to keep the money thus acquired, it will not allow its own officer to do this. "It will," said this learned judge, "direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a court of common law the court would order him to repay it as soon as the mistake was discovered." The doctrine of these cases commends itself to both reason and justice.

In quoting with approval the expressions of these learned English judges, we mean no reflection, even indirectly, upon the receiver or

his learned counsel. Indeed, the diligence and tenacity of these gentlemen, in the pursuit of property for the benefit of the trust estate represented by them, are commendable. It would, however, be a reproach upon the administration of justice should the court, when the question is squarely before it, hesitate to admonish its officer to desist from further efforts to augment his trust estate at the expense of one who is clearly entitled to the money which that officer holds.

We think, therefore, that the direction below was right and that the judgment appealed from should be affirmed, with costs.

WILLIAMS and PATTERSON, JJ., concurred; VAN BRUNT, P. J., and RUMSEY, J., concurred in result upon second ground stated in opinion.

Judgment affirmed, with costs.¹

MOWATT v. WRIGHT.

SUPREME COURT OF NEW YORK, 1828.

[1 *Wendell*, 355.]

THIS was an action of assumpsit, commenced in 1827, tried at the New-York circuit in April, 1828, before the Hon. Ogden Edwards, one of the circuit judges, to recover back \$1000, paid by the plaintiffs to the defendant under the following circumstances: In 1821, the defendant brought several actions to recover her dower, as the widow of Dr. John G. Wright, in certain real estate in the city of New-York. The late John Mowatt, junior, the father of the plaintiffs, was vouched to warrant the title of the defendants in those suits, as he had formerly owned the property, and had sold it with a covenant of warranty. Pending the suits he died, and his heirs, the plaintiffs, were vouched in his place. On the 24th November, 1821, a compromise was effected, the terms of which were, that the plaintiffs should pay the defendant \$1000, that the suits should be discontinued, the parties paying their own costs, that the defendant should execute a release of dower, and her children should quit-claim all interest in the premises. The money was accordingly paid, and the releases executed. A few days after the settlement, a release was found in the possession of Col. Platt, through whom the title had passed, executed by the husband of the defendant and herself, bearing date the

¹See in addition to cases cited in the text of principal case: *Dixon v. Brown* (1886) L. R. 32 Ch. D. 597; *In re Opera*, L. R. [1891] 2 Ch. 154; *Moulton v. Bennett* (1836) 18 Wend. 586 (in which an attorney as officer of the court was compelled to return fees not legally chargeable).—Ed.

8th day of May, 1784, conveying the premises in which dower had been demanded, to Colonel Burr, from whom the title had passed to Colonel Platt, from Platt to J. Winter, and from Winter to J. Mowatt, the ancestor of the plaintiffs.

By the Court, SAVAGE, Ch. J. The question is, whether the \$1000 were paid by mistake of the facts, or compulsion of law; or whether it was voluntary, and to compromise a suit and a disputed claim? At the trial, it was attempted to shew fraud in Mrs. Wright; but that was satisfactorily rebutted. She was married at 17 years of age, and soon after executed the conveyance of these lots. In 1821, she was informed by a Mr. Baldwin, that she had a right of dower in certain lots; but she had forgotten that her husband had ever owned those lots, and took pains to make all possible inquiries for the conveyance, before she brought her suits. The jury passed upon the question of actual fraud, and found a verdict in her favor. On the question of mistake and compulsion, the judge decided that the plaintiffs were not entitled to recover. It appeared that the attornies and counsel for the defendants in the dower suits, were of opinion that a release had been executed by Dr. Wright, in which the defendant had joined. A lease for one year from Dr. Wright to Col. Burr was found; and it was therefore believed that a proper release had also been executed. The testimony is uncontradicted, that the payment of the \$1000 was voluntary, as a compromise of Mrs. Wright's claim, and of the claim of the heirs of her husband; but it is contended that the payment was compulsory, inasmuch as a suit was brought, and at the time of the compromise, the conveyance from Mrs. Wright could not be found.

The action for money had and received in general, lies for money which *ex aequo et bono*, the defendant ought to refund, as for money paid by mistake; or upon a consideration which happens to fail; or for money obtained by imposition; or extortion; or oppression; or by taking an undue advantage of the plaintiff's situation. 2 Burr. 1012. A mistake which entitles a party to sustain this action, must be a mistake of fact. Where there is no fraud nor mistake in matter of fact, if the law was mistaken, the rule applies that *ignorantia juris non excusat*. Doug. 471. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist, which really does not exist. But when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law. 2 Ev. Poth. App. 437. It is now generally conceded, that the law is as laid down by BULLER, Justice (Doug. 471), that the mistake must be a mistake of fact and not of law, though a very learned argument will be found in Evan's Pothier, sustaining the proposition that a mistake of either law or fact, will entitle the party, paying money under it, to maintain this action to recover it back. Some of the earlier cases do not take

the distinction; and DE GREY, Chief Justice, in *Farmer v. Arundel*, 2 Bl. Rep. 824, 825, says, where money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie; but the later authorities contradict this proposition so far as regards a mistake of the law. There are cases also of payment by compulsion, and by legal process, where the party has been subsequently permitted to recover it back. The case of *Astley v. Reynolds*, 2 Str. 915, was an action for money had and received. The plaintiff had pawned plate to the defendant for £20, and went afterwards to redeem it, and offered the principal and £4, which was more than legal interest; but the defendant demanded £10, which the plaintiff paid, and then brought his action to recover the excess above lawful interest. It was contended that he could not recover, there being neither mistake nor force, and his remedy by trover being open to him after tender, and therefore he came within the rule that *volenti non fit injuria*. But the court said they considered it a payment by compulsion; that the plaintiff might have such immediate want of his goods, that trover would not afford him a proper remedy; that *volenti non fit injuria* applies only where the party had his freedom of exercising his will, which this man had not. I presume there were facts in that case not reported, from this remark, as there is nothing in the case to shew that the plaintiff had not the liberty of exercising his will. This case, Ch. J. SPENCER, in *Hall v. Schultz*, 4 Johns. R. 245, considers as overruled by *Knibbs v. Hall*, 1 Esp. 84, where, in an action for use and occupation, it appeared that the plaintiff had let certain rooms to the defendant. The plaintiff demanded rent at 25 guineas; the defendant insisted that he had taken them at 20 guineas; but on the plaintiff's threatening to distrain, defendant paid the 25 guineas. He now offered to shew, that the rent was really but 20 guineas, and to set off the 5 guineas in this action, as having been paid by compulsion. But Ld. KENYON was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress.

There are cases, undoubtedly, where an undue advantage is taken of the party's situation, in which he may pay money, with knowledge of all the facts and the law too, and afterwards recover it back. Such was the case of ——— *v. Piggott*, cited in *Cartwright v. Rowley*, 2 Esp. 723, where the steward of an estate being in possession of deeds wanted on a trial, charged extravagantly for producing them, and the money was recovered back from him in this action. The money was held not to have been paid voluntarily, but from necessity and the urgency of the case, as the plaintiff could not do without the deeds.

The case of *Cobden v. Kendrick*, 4 T. R. 431, has been relied on for the plaintiff. The facts were these: Previous to that suit, the defendant, K., had sued the plaintiff, C., on a promissory note; and after

a writ of inquiry executed, the suit was compromised and part paid. Soon afterwards, Kendrick told his attorney that he was glad it was compromised, for it was a lottery transaction, and he had given but £10 for the note, which was for £150: thereupon, this suit was brought for the money so paid. No question was raised but that the action was sustainable. It was a clear case of fraud. But in *Mariott v. Hampton*, 7 T. R. 269, the facts were more analogous to the case before us. H. had previously sued M. for goods sold, and which had actually been paid for and a receipt given; but not being able to produce the receipt, nor prove payment in any other manner, M. gave a cognovit and paid the money. Mariott afterwards found the receipt, and brought his action for money had and received; but Lord KENYON held, that money recovered under legal process, could not be recovered back, however, unconscientiously retained by the defendant, and nonsuited the plaintiff. On a motion to set aside the nonsuit, the court said, that after recovery by legal process, there must be an end of litigation; and that it would tend to encourage the greatest negligence, if a door were opened to parties to try their causes again, because they were not properly prepared with their evidence the first time. Neither of these cases can be said to be like this case; for, in the first, the recovery was on the ground of fraud, which is negatived here; and the last differs from this, because there had been an actual judgment, though by cognovit, and here there was a compromise before judgment. The cases founded on mistake, seem to rest on this principle: that if parties, believing that a certain state of things exists, come to an agreement with such belief for its basis, on discovering their mutual error, they are remitted to their original rights. On this principle was determined the case of *Cox v. Prentice*, 3 M. & S. 344, where a bar of silver was purchased by the plaintiffs of the defendant, and paid for according to the number of ounces calculated by an assay-master; but it being ascertained afterwards that a mistake had been made, by which they had paid more than the value, they brought their action and recovered the excess. Lord ELLENBOROUGH said it was a case of mutual innocence and equal error, and a proper case for such an action. But when a party pays money voluntarily, with full knowledge, or full means of knowledge of all the facts of the case, the party so paying cannot recover it back. *Bilbie v. Lumley*, 2 East, 470. The ground on which the action was brought, was, that the money was paid under a mistake, by which the underwriter had paid an insurance, a material letter having been withheld at the time of insurance. At the trial, that fact was contradicted; and the plaintiff then insisted that the money having been paid under a mistake of the law, the action might be sustained; and so the judge ruled at *nisi prius*. But on motion to set aside the verdict, Lord ELLENBOROUGH said he never heard of any case, except *Chatfield v. Paxton*, where such a recovery was had; and that case was ultimately de-

cided on some other circumstances; but it was so doubtful as not to be reported.

In *Brisbane v. Dacers*, 5 Taunt. 155, BEST, Justice, gives a full statement of the case of *Chatfield v. Paxton*, having been counsel in the cause, from which it seems that the intimation given by Lord KENYON at the trial, that ignorance of the law was a sufficient ground for the action, was abandoned, and the judges put it wholly on the ground that the plaintiff had not a knowledge of the facts. In the course of the argument, BEST, Serjeant, advanced this proposition, speaking of the doctrine of Lord ELLENBOROUGH, in *Bilbie v. Lumley*, to wit: that money shall not be recovered back, if it be consistent with honor and conscience to retain it, but otherwise it shall. GIBBS, Justice, interrupted him, saying, "The principle has always been this: wherever the money has been paid in consequence of a demand as of right, then, although the demand was unfounded, the payment cannot be recovered back." There is a case of money paid under distress for standings in a market; though the party had no right to distrain, the money could not be recovered back. The facts in the case then under argument were, that the plaintiff was captain of a ship under command of the defendant's testator, Admiral Dacers. The plaintiff had received a considerable sum for transporting specie, one third of which he paid to the admiral, under a mistaken apprehension that he was entitled to it, and then brought his action to recover it back. In deciding the case, GIBBS, Justice, says, "We must take this payment to have been made under a demand of right," and then repeats the doctrine above stated. He adds, "I think, that by submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and makes it his, and closes the transaction between them." This was said under the supposition that there was a full knowledge of all the facts upon which the demand was founded.

In the case of *Bulkely v. Stewart*, 1 Day, 133, the supreme court of Connecticut say, "This action does not lie to recover back money voluntarily paid on a claim which the party disputes, though he pay it, expressly reserving his right to litigate his claim." The cases in Massachusetts, where the plaintiff recovered, are cases where the money was paid under a mistake of the facts. Many more cases might be cited, but those already referred to, shew the principles upon which the action has been sustained, and upon which it has been defeated. In the present case, it now appears that the defendant had, in fact, no right to the money paid by the plaintiffs; but it was paid upon a claim of right which was honestly made by her; and the plaintiffs here, who were virtually defendants in the dower suits, acted under as full a knowledge of the facts as the demandant. She, in truth, believed that she had never executed a deed; but the plaintiffs acted under the belief, as testified by the witnesses, that there was such a deed in existence, but for reasons which are stated,

they thought that the payment of the \$1000 was the shortest and cheapest way of settling the dispute. This sum of money, then, was given to Mrs. Wright to quiet the claim, in the language of Mr. Justice BEST. She had a right to consider it her own without dispute. She has probably spent it; "and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

I cannot consider this is a case of mistake of fact or of law. Mrs. Wright brought suits for a claim which she thought well founded. The defendants believed there was a defence, but they could not produce the evidence of it, like the case of the lost receipt: they, therefore, paid a sum of money, as the easiest and cheapest way of settling the claim. It is a voluntary payment, though they would not have made it, could they have produced the evidence of their title at the time. It is now too late to call the settlement in question.

I am of opinion that the motion to set aside the verdict be denied.¹

ERKENS v. NICOLIN.

SUPREME COURT OF MINNESOTA, 1888.

[39 *Minnesota*, 461.]

APPEAL by defendant from an order of the district court for Scott county, EDSON, J., presiding, refusing a new trial after a trial by the court.

MITCHELL, J. Action to recover back the money paid by plaintiff to defendant for a quitclaim deed of a piece of land in the village of Jordan. The facts, as disclosed by the evidence, are that the defendant platted into lots a tract of land, of which he was the owner, lying between Water street and Sand creek. As shown upon the plat, the north and south lines of the lots extend from Water street to the creek. The distance marked on the plat gave the length of these lines as 80 feet, but the actual distance from Water street to the

¹Clarke v. Dutcher (1824) 9 Cow. 674 is usually regarded as the leading case in this country on mistake of law. The question was not really involved, as the recovery was barred by the statute of limitations, so that the learned and elaborate discussion on the point of mistake is really a *dictum*. It does, however, state the law as it is, and is therefore valuable, although clearly *obiter*.

"That a right of recovery in such cases, where there is mistake or ignorance as to material facts, but not where there is a mistake of law but no mistake as to the facts, is a point upon which Mowatt v. Wright is frequently cited as an authority in the New York decisions. Wheadon v. Olds, 20 Wend. 176;

creek was 110 feet. One of these lots, and the adjoining 35 feet of another, had been conveyed by defendant, according to the plat, to plaintiff or plaintiff's grantor. Subsequently defendant claimed and stated to plaintiff, in substance, that the lots only extended back 80 feet, according to the distance indicated on the plat, and hence that he still owned the strip of 30 feet next to the creek. Plaintiff knew that defendant's claim was based wholly upon the theory that the distance given on the plat would control, and hence that his claim of title was in fact but expressions of opinion as to the legal effect and construction to be given to the plat. So far as the evidence shows, defendant made this claim in good faith, and honestly supposed that his deeds of the lots only conveyed 80 feet. Plaintiff took the matter under consideration for nearly a month, and went to the register's office and examined the plat for himself. He then obtained from defendant and wife a quitclaim deed of all the land down to the creek, and paid therefor the money which he now seeks to recover. When he paid the money he knew all the facts, and had the same means of

Rheel v. Hicks, 25 N. Y. 291; Chapman v. City of Brooklyn, 40 *id.* 380; Supervisors of Onondaga Co. v. Briggs, 2 Den. 40; Boyer v. Pack, *id.* 108; Hargous v. Ablon, 3 *id.* 408; Wyman v. Farnsworth, 3 Barb. 371; Lott v. Swezey, 29 *id.* 92; Grainger v. Olcott, 1 Lans. 171; Goddard v. Merchants' Bank, 2 Sand, 253. That the action for money had and received is founded on principles of equity, and entitles the defendant to show, if he can, that he is not equitably bound to pay the money, is held on the authority of the principal case, in Eddy v. Smith, 13 Wend. 491."—Note to principal case in 19 Am. Dec. 515.

So if plaintiff and defendant submit a question of boundary to a surveyor who establishes the line, and plaintiff thereupon pays money for trees cut on defendant's land, the plaintiff cannot, in the absence of fraud, recover in *assumpsit* the money so paid if a second survey shows that the line first drawn was incorrect, and that the trees were thus cut from plaintiff's own land. McArthur v. Luce et al. (1880) 43 Mich. 435. See, however, similar case of Turner Falls Lumber Co. v. Burns (1899) 71 Vt. 354, in which a recovery was allowed.

In West v. Houston (1844) 4 Harrington, 170, it appeared that the Messrs. West brought an action against Houston for \$90 and recovered \$44.50, but failed to file a certificate for the costs—\$15.15—which was a condition precedent to their recovery. The defendant in the original action, supposing the certificate had been filed, paid the costs. On *assumpsit* for money had and received, the court said:

"Where there is a payment in ignorance of or mistake of a fact, it may be recovered back, unless the mistake arises from the negligence of the party to examine and take notice of information within his full means of knowledge. Here the plaintiff was party to the very record of the judgment which he was paying, which record showed the fact he now alleges he was ignorant of."

This admirable little case should be considered in connection with the subsequent sections dealing with the question of unjust enrichment at plaintiff's expense, and the effect of plaintiff's negligence.—Ed.

knowledge of them which defendant had. The transaction was unaffected by any fraud, trust, confidence, or the like. The parties dealt with each other at arm's length. Plaintiff was not laboring under any mistake of facts. He took the deed and paid his money under a mistake of law as to his antecedent existing legal rights in the property, supposing that, according to the proper legal construction of the plat, the lots were only 80 feet deep. However, under the doctrine of *Nicolin v. Schneiderhan*, 37 Minn. 63 (33 N. W. Rep. 33), since decided by this court, it is now settled that a deed of lots according to this plat would cover all the land down to the creek, under the rule that distances must yield to natural boundaries called for in a deed. We are unable to see that this case differs in principle from *Perkins v. Trinka*, 30 Minn. 241 (15 N. W. Rep. 115), and *Hall v. Wheeler*, 37 Minn. 522 (35 N. W. Rep. 377).

It is unnecessary to enter into any discussion of the question (left in great confusion in the books) when, if ever, relief will be granted on the ground of mistake in law alone, or whether there is any difference between mistake of law and ignorance of law, or between ignorance or mistake as to a general rule of law and ignorance or mistake of law as to existing individual rights in the property which is the subject-matter of the contract. We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, especially where, as was evidently the fact in this case, the transaction was intended to remove or settle a question of doubt as to title. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights. It would be difficult to tell what titles would stand, or what contracts would be binding, if grantors and grantees were at liberty to set up such a plea. This may seem to work inequitably in the present case, but more mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles.

Order reversed.¹

¹The relief administered in equity by ordering the delivery, cancellation or reformation of legal instruments on the ground of mistake of law or fact is beyond the scope of the law of quasi-contracts. It may be said, however, that prior to 1802, courts of equity, following the law in this respect, administered relief, in proper cases, irrespective of the nature of the mistake; that since the case of *Billie v. Lumley* in 1802, courts of equity have regretfully followed the law (Lord ELLENBOROUGH's law) and refused relief in cases of mistakes of mere law unmingled with fact. *Freeman v. Curtis* (1862) 51 Me. 140. The equitable conscience is rather sensitive to fraud, undue influence, etc., and has granted relief, when, in view of all the circumstances, it would

2. MISTAKES OF FACT MAY BE

(a) *Mistake as to Creation of a Contract.*

MARTIN v. SITWELL.

KING'S BENCH, 1692.

[1 *Shower*, 156.¹]

INDEBITATUS ASSUMPSIT for five pounds received by the defendant to the plaintiff's use, *non assumpsit* pleaded.

Upon evidence it appeared that one Barksdale had made a policy of assurance upon account for five pounds premium in the plaintiff's name, and that he had paid the said premium to the defendant, and

be "inequitable" to dismiss the bill. Indeed, there are not wanting expressions to the effect that equity administers relief for mistakes of law where a court of law would not, but on the whole, it may be said that equity follows the maxim *ignorantia juris neminem excusat*, although not so rigidly as does a court of law.

The following cases will indicate chancery practice: *Livesey v. Livesey* (1827) 3 Russ. 287 (relief allowed); *McCarthy v. Decaix* (1831) 2 Russ. & M. 614 (relief allowed on mistake of law and fact); *Dibbs v. Goren* (1849) 11 Beav. 483 (relief allowed); *Cooper v. Phibbs* (1867) L. R. 2 Eng. & Irish App. 149 (in which Lord WESTBURY suggests the distinction between public and private law which has had a theoretical as well as practical following); *Earl Beauchamp v. Winn* (1873) L. R. 6 Eng. & Irish App. 223; *Rogers v. Ingham* (1875) L. R. 3 Ch. D. 351; *Eaglesfield v. Marquis of Londonderry* (1875) L. R. 4 Ch. D. 693; *Daniell v. Sinclair* (1881) L. R. 6 App. Cas. 181; *In re Hulkes* (1886) L. R. 33 Ch. D. 552.

In the United States, a single reference will suffice for illustration: *Hunt v. Rousmaniere's Adm.* (1828) 1 Pet. 1 (and the various Federal and State decisions following this case as given in 2 Rose's Notes on U. S. Reports, 642-649).

The following extracts may be of service:

"The result, therefore, is, that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said *ignorantia juris haud excusat*; but in that maxim the word *jus*

¹Reported also in *Holt*, 25.—Ed.

that Barksdale had no goods then on board, and so the policy was void, and the money to be returned by the custom of merchants.

At the trial I urged these two points. First, That the action ought to have been brought in Barksdale's name, for the money was his, we received it from him, and if the policy had been good it would have been to his advantage; and upon no account could it be said to be received to Martin's use, it never being his money. Besides, here may be a great fraud upon all insurers, in this, that an insurance may be in another man's name, and if a loss happen then the insurer shall pay, for that some *cestui que trust* had goods on board; if the ship

is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.”—Lord WESTBURY, in *Cooper v. Phibbs*, *supra*.

“With regard to the objection, that the mistake (if any) was one of law, and that the rule *ignorantia juris neminem excusat*, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed.”—Lord CHELMSFORD, in *Earl Beauchamp v. Winn*, *supra*.

“A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, ‘You may, she is a single woman of large fortune.’ It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, ‘Now, you see, the lady is single,’ that

arrive, then the nominal trustee shall bring a general *indebitatus* for the premium, as having no goods on board.

To all which HOLT, Chief Justice, answered, that the policy being in Martin's name, the premium was paid in his name and as his money, and he must bring the action upon a loss, and so upon avoidance of the policy for to recover back the premium. And as to the inconveniences, it would be the same whosoever was to bring the action, and therefore the insurers ought with caution to look to that beforehand.

Then, secondly, I urged that it ought to have been a special action of the case upon the custom of merchants, for this money was once well paid, and then by the custom it is to be returned upon matter

would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

"There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

"It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 consols involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law."—Sir GEORGE JESSEL, M. R., in *Eaglesfield v. Marquis of Londonderry*, *supra*.

"Undoubtedly there are cases in the courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn."—Sir ROBERT P. COLLIER, in *Daniell v. Sinclair*, *supra*.

"If the mistake of law, or as to his private right, be that of one party only to a transaction, it may be either that the mistake was induced or encouraged by the misrepresentation of the other party, or that, though not so induced or encouraged, it was known to and perceived by him, and was taken advantage of, or it may be that he was not aware of the mistake. Whatever may be the circumstances of the case, a court of equity may, under the peculiar circumstances of the case, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr on Fraud and Mistake (2 Ed.) 470.—Ep.

happening *ex post facto*. I argued if the first payment were made void, then the law will construe it to be to the plaintiff's use, and so an *indebitatus assumpsit* will lie. But when a special custom appoints a return of the premium, an *indebitatus* lies not, as for money received to the plaintiff's use, but a special action of the case upon that particular custom.

To which HOLT, Chief Justice, answered me with the case adjudged by WADHAM WYNDHAM, of money deposited upon a wager concerning a race, that the party winning the race might bring an *indebitatus* for money received to his use, for now by this subsequent matter it is become as such. And as to our case the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use.

And so judgment was for the plaintiff against my client.

STEVENSON v. SNOW.

KING'S BENCH, 1761.

[3 *Burrow*, 1237.]

THIS was a special case reserved at a trial at *Nisi prius* before Lord MANSFIELD in *London*, upon an action for money had and received to the plaintiff's use, brought by the plaintiff the insured, against the defendant the insurer, for a return of part of the premium.

Case—It was an insurance upon a ship, at five guineas *per cent.* lost or not lost, at and from *London* to *Halifax* in *Nova Scotia*, warranted to depart *with convoy* from *Portsmouth* for the voyage, that is to say, the *Halifax* or *Louisbourg* convoy.

Before the ship arrived at *Portsmouth*, the *convoy* was GONE. Notice of this was immediately given by the insured to the under-writer: and at the same time, he was also desired either to make the long insurance, or to return part of the premium.

The jury find that the usual settled premium from *London* to *Portsmouth* is one and one-half *per cent.*

They find also that it is *usual* for the under-writer, in such like cases, to return *part* of the premium: but the *quantum* is uncertain: (and the *quantum* must in its nature be uncertain, because it depends upon uncertain circumstances.)

It is stated that the plaintiff made to the defendant an offer of allowing him to retain one and one-half *per cent.* for the risque he had

run on such part of the voyage as was performed under the policy, *viz.* from *London* to *Portsmouth*.¹

LORD MANSFIELD, having first stated the case, said,—I had not at the trial, nor have now, the least doubt about this question, myself.

These contracts are to be taken with great latitude; the strict letter of the contract is not to be so much regarded, as the object and intention of it.

Equity implies a condition “That the insurer shall not receive the price of running a risque, if he runs none.”

This is contract WITHOUT *any consideration*, as to the voyage from *Portsmouth* to *Halifax*: for he *intended* to insure *that* part of the voyage as well as the former part of it; and HAS NOT. Consequently, the insured received no consideration for *this* proportion of his premium. And then this case is within the general principle of actions for monies had and received to the plaintiff’s use.

I do not go upon the *usage*: for the usage found is only “That in like cases, it is *usual* to return a *part* of the premium; without ascertaining *what* part.”

If the *risque* is NOT RUN, though it is by the *neglect* or even the *fault* of the party insuring, yet the insurer shall *not retain* the premium.

It has been objected, “That the voyage being *begun*, and *part* of the *risque* being already run, the premium can not be apportioned.” But I can see no force in this objection. This is *not* a contract so entire that there can be no apportionment. For there are two parts in this contract; and the *premium* may be *divided* into two distinct parts, relative, as it were, to two voyages.

The practice shews, “That it has been *usual*, in such like cases, to return a part of the premium; though the *quantum* be not ascertained. And indeed the *quantum* must vary, as circumstances vary: so that it never can have been fixed with any precise exactness.

But though the *quantum* has not been ascertained; yet the *principle* is agreeable to the general sense of mankind.

Mr. Justice DENISON was of the same opinion.

It is most equitable, that the defendant should only retain the premium for *such part* of the voyage as he has run the *risque* of. The insured has a right to have the other part restored to him. And this is agreeable to the general principle of actions for money had and received to the plaintiff’s use: where the defendant had no right to retain it, he must refund it.

Mr. Justice FOSTER declared himself to be of the same opinion. There is *no consideration* for the remainder of the premium; for the voyage from *Portsmouth* to *Halifax*, wherein no *risque* was run by the

¹Arguments of counsel (*Yates* for plaintiff and *Wedderburn* for defendant) omitted.—ED.

insurer, who only insured the voyage *with* convoy: therefore he has no right to retain the premium for *this*.

Mr. Justice WILMOT declared his concurrence most clearly and strongly. He said these kinds of contracts are by the writers on this head, called *contractus innominati*: and the rule which they lay down concerning them is, "That they are to be determined *secundum bonum et æquum*."

The jury had here found *usage* "*to return part of the premium, in such cases*:" which is a strong proof of the equity of the thing. And nothing can be more just and reasonable.

If the *risque* was once *begun*, the insured shall not deviate or return back, and then say "I will go no farther under this contract, but will have my premium returned."

But upon *this* policy, there are *two distinct* points of time, in effect two voyages, which were clearly in the contemplation of the parties: and *only one* of the two voyages was made; the *other*, not at all entered upon. It was a *conditional* contract: and the second voyage was not begun. Therefore the premium must be returned: for upon this second part of the voyage, the *risque never took place* at all.

This is agreeable to what the writers on this subject lay down; and is the right and justice of the case.

Per Cur'. unanimously—

Let the *postea* be delivered to the plaintiff.¹

If, however, the contract is entire and the risk has attached, recovery is not allowed: *Tyrie v. Fletcher* (1777) 2 Cowp. 666; *Loraine v. Tomlinson* (1781) 2 Doug. 585; *Bernon v. Woodbridge* (1781) 2 Doug. 781—all by Lord MANSFIELD. And see for observations on the principal case, *Rothwell v. Cooke* (1797) 1 B. & P. 172.

In *Feise v. Parkinson* (1812) 4 Taunt. 640, the court allowed the premium to be recovered in the count for money had and received, Guss, C. J., saying: "Where there is fraud, there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium."

In *Martin v. Sitwell*, *ante*, the goods insured were not on board; in the principal case, the risk was not run, or at least only for part of the voyage from London to Portsmouth.

In the case of *McCulloch v. Royal Exchange Assurance Co.* (1813) 3 Camp. 406, it appeared that the plaintiff effected a policy of insurance on ship and freight: that the voyage was made in safety and that freight was earned. It further appeared that the plaintiff had no insurable interest on account of a defect in his title to the ship. On an action for money had and received to recover the premium, the judgment was for the defendant. See Keener's *Treatise*, 118, for adverse criticism, and see also *Farmers' Mut. Ins. Co. v. Turnpike Co.* (1888) 122 Pa. St. 37; *New Holl. Turnpike Co. v. Farmers' Ins. Co.* (1891) 144 Pa. St. 541.

In *Turner Falls Lumber Co. v. Burns* (1899) 71 Vt. 354, the plaintiff contracted to purchase and did actually buy from the defendant lumber cut from

KILGOUR v. FINLYSON, GALBREATH & HARPER.

COMMON PLEAS, 1789.

[1 *Henry Blackstone*, 155.]

INDORSEE against the ostensible indorsers, who also appeared to be the drawers of a bill of exchange. Money paid, money had and received, account stated. Verdict for the plaintiff.

The circumstances of this case were as follows:—

The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership, from Midsummer 1785, to the 28th of July, 1787, when the partnership was dissolved, and notice of the dissolution given in the Gazette as under,—

Notice is hereby given, that the copartnership between Thomas Finlyson, Thomas Galbreath, and Henry William Harper, of Bow churchyard, warehousemen, under the firm of Finlyson, Galbreath, and Harper, and also at Glasgow, under the firm of Henry William Harper and company, was by mutual consent dissolved this day; all demands upon the above firm will be paid by Thomas Finlyson of Bow churchyard, who is empowered to receive and discharge all debts due to the said copartnership.

Witness our hands, this 28th day of July, 1787,

THOMAS FINLYSON,
THOMAS GALBREATH,
HENRY WILLIAM HARPER.

At the time of the above dissolution one Scott was indebted to the partnership in £758 and the partnership indebted to Sterling Douglas & Co. in £890. On the 21st of September, 1787, Finlyson drew the bill in question in the name of the late partnership, on Scott, payable on the 23d of November following, for £304 2s., which Scott accepted. On the 9th of October, Finlyson indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note for £304 3s. 6d. payable on the 25th of November (the difference of 1s. 6d. being on account of the note being due two days later than the bill). This note of the plaintiff's was indorsed by Finlyson to Sterling Douglas & Co., who discounted it, and received the money they had advanced by so discounting the note, back again from Finlyson, in part of payment of the debt owing to them from

his own land in the belief that it was the defendant's. The mistake was due to defendant, and the court allowed a recovery. In the insurance cases there was no risk, hence no benefit; here there was no benefit to plaintiff in paying for his own property and the recovery was properly allowed.—Ed.

the partnership. When the note became due the plaintiff paid it to Sterling Douglas & Co. Two days before Scott's bill became due Finlyson took it up, and gave in lieu of it another bill to the plaintiff, accepted by Lee, Strachan, & Co., but did not take back Scott's bill. Afterwards Lee, Strachan, & Co.'s bill not being paid, and Finlyson having become a bankrupt, the plaintiff brought this action against all the partners on Scott's bill, which remained in his hands, and obtained a verdict.

A rule being granted to show cause why this verdict should not be set aside, and a new trial granted.

Adair and Bond, Serjts., showed cause. *Le Blanc and Lawrence*, Serjts., for the rule.¹

LORD LOUGHBOROUGH. I was of opinion at the trial, that there was an equity in favor of the plaintiff, the money arising from his note being *de facto* applied for the benefit of the partnership, and the authority from the other partners giving him power to discharge their debts. But I am now convinced that I was mistaken. Consider the nature of this transaction: Finlyson applies to Kilgour to discount the bill accepted by Scott, and in part of the discount takes a promissory note from him; Kilgour, before Scott's bill became due, changes it with Finlyson for another, accepted by Lee, Strachan, & Co., returns that, and takes Scott's bill back again. Now all this was carried on without any idea of the former partners being bound by it. On the 10th of October, long before the plaintiff's note was due, the defendant applied to Sterling Douglas & Co. to discount it, who accordingly did discount it, but received the money back again in part of payment of their debt owing from the partnership. When this note became due the plaintiff paid it to Sterling Douglas & Co., but at that time no debt was owing to them from the partnership; the payment therefore of the plaintiff was not a payment to the use of the partnership. Though the money raised by discounting his note before it was due was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by Finlyson.

HEATH and WILSON, Justices (Mr. Justice GORLD being absent), of the same opinion.

*Rule absolute for a new trial.*²

¹Arguments of counsel are omitted.—En.

²"If the money, goods, or other consideration, furnished by a creditor has been actually applied for the benefit of the firm in the winding up of the partnership affairs, and the creditor is precluded by knowledge or public notice from charging the partners upon the express contract, he ought to be allowed to recover what he has furnished, or its equivalent, upon the principle that no one should be permitted dishonestly to enrich himself at the expense of another. This principle was recognized in *Prudhomme v. Henry*, 5 La. An. 700 (see also *Bogeran v. Guéringer*, 14 La. An. 478, 479); *White v. Tudor*, 32 Tex. 758. But see *contra*, *Abel v. Sutton*, 3 Esp. 108, (*semble*);

VAN DEUSEN ET AL. v. BLUM ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1836.

[18 *Pickering*, 229.]

THIS was an action of debt. The declaration contained two counts upon a special contract under seal, a third upon a *quantum meruit* for labor performed, and a fourth upon a *quantum valebant* for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the first two counts he pleaded *non est factum*, and to the third and fourth, *nil debet*.

At the trial, before MORTON, J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it.

The judge ruled, that the instrument could not go in evidence to the jury as the deed of Thouvenin.

The contract was for building a dam by the plaintiffs for Blum and Thouvenin, across the Housatonic River; which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that there being an express contract executed by the plaintiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone.

But the judge ruled, that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not

Kilgour v. Finlyson, 1 H. Bl. 155; Bowman v. Bledgett, 2 Met. 308; Haven v. Goodel, 1 Disney, 26; McCowin v. Cubbison, 72 Pa. 358." Ames' Cases on Partnership, 544, last paragraph.

The cases are, however, generally in accord with the principal case on this point.—Ed.

finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole court.

MORTON, J., delivered the opinion of the Court. Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebant*. 1 Chit Pl. 107; 2 Wms.'s Saund. 117 *b*, note; Union Cotton Manufactory v. Lobdell, 13 Johns. 462. Hence these counts may well be joined with counts upon a specialty. Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178.

It was long doubted whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same. Hayward v. Leonard, 1 Pick. 181; Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178; Munroe v. Perkins, 9 Pick. 298; Brewer v. Tyringham, 12 Pick. 547.

The general authority derived from the relation of partnership does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See Cady v. Shepherd, 11 Pick. 400, and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as they benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict.¹

¹"If a firm deed, executed without the authority of all the partners, and therefore inoperative either as a specialty or as a simple contract of the firm, is given in exchange for money, goods, or the like, the firm is equitably liable to the extent of the value received, and may accordingly be so charged upon a quasi contract. McCauley v. Jenney, 5 Houst. 32 (*semble*); Walsh v. Lennon, 98 Ill. 27; Daniel v. Toney, 2 Met. (Ky.) 523; Hermanns v. Duvingneand, 10 La. An. 114; Van Densen v. Blum, 18 Pick. 229; Moore v. Stevens, 60 Mass. 809, 816 (*semble*); Despatch Line v. Bellamy, 12 N. H. 205, 235

REID v. RIGBY & CO.

QUEENS BENCH DIVISION, 1894.

[*Law Reports* (1894) 2 *Queens Bench*, 40.]

APPEAL by the plaintiff from the decision of the judge of the Westminster County Court, in favour of the defendants, in an action brought by the plaintiff, first, to recover £20 on a cheque, and, secondly, to recover the same sum as money received by the defendants to the use of the plaintiff.

The cheque in question was signed "Rigby & Co. per procuration of J. Allport, manager," and was drawn on May 21, 1892. The claim was made after Allport's death. It was found by the county court judge that Allport had been the manager of the defendants' firm, and had authority to draw on their banking account for the purposes of their business, but had no authority to overdraw their account, which he had overdrawn, or to borrow money on their behalf. It was also found that Allport had borrowed this sum of £20 for his own purposes, in order to replace money of the defendants which he himself had abstracted. The evidence shewed that Allport had obtained the cheque from the plaintiff by a statement that he was short of money, and wanted the money to pay the wages of the defendants' workmen, and it was shewn that he had paid the money into the defendants' account at their bank, and had used it to pay the wages of their workmen.

CHARLES, J. This action is brought in a twofold form: first, on a cheque given by Allport, the defendants' manager, to Reid, the plaintiff, as security for a sum of £20 borrowed by Allport from the

(*semble*); Wharton v. Woodburn, 4 Dev. & B. 507; Delius v. Cawthorn, 2 Dev. 90 (*semble*); Osborne v. High Shoals Co., 5 Jones (N. Ca.) 177.

"But see contra, Morris v. Jones, 4 Harringt. 428; Spear v. Gillet, 1 Dev. Eq. 466; Bond v. Aitkin, 6 Watts & S. 165; Waugh v. Carriger, 1 Yerg. 31; Galt v. Calland, 7 Leigh. 594." Ames' Cases on Partnership, 489 (last two paragraphs).

In Benham v. Emery (1887) 46 Hun. 156, the defendant's husband entered into a contract under seal with plaintiff by which the latter agreed to do certain carpentering and to furnish lumber necessary to erect a house on defendant's land for the sum of \$1,800. Mrs. Emery was not a party to the contract, and was held not to be bound by its terms: but the court permitted the plaintiff to pass by the written agreement and recover in quasi-contract for the work and labor done, and materials furnished, of which the defendant had had the benefit. See also, Graves v. Smith (1893) 7 Wash. 14; Jewell v. Schroepell (1825) 4 Cow. 564; City Trust Co. v. American Brewing Co. (1902) 70 App. Div. (N. Y.) 511; O'Brien v. Fowler (1887) 67 Md. 561.—En

plaintiff in the name of the defendants; and, secondly, for the same sum of £20 as money received to the use of the plaintiff. As to the claim on the cheque, it appears that Allport was the general manager of the defendants, and as such had express authority to draw on their banking account for the purposes of their business, and he had also a general authority to pay money in to the bank to their account. No question arose as to any special authority. Allport told the plaintiff that he was short of cash and wanted money to pay the workmen's wages, and he gave a cheque signed per procuration for Rigby & Co., the defendants. On the face of it that cheque conveyed an intimation to the plaintiff that Allport, as the agent of the defendants, had only a limited authority to sign. This is expressly provided by the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 25. As a matter of fact, the defendants' banking account was at that time overdrawn, and the county court judge has found that Allport had no authority to overdraw that account; and he has also found—and we must accept his finding on this point as correct—that Allport had no authority to borrow money for the defendants. But he did borrow money, and having got the money he paid it in to the defendants' banking account. I say that this is so because the cash-book, which I have carefully examined, leaves no doubt in my mind that the £20 found its way into the defendants' banking account. It appears that a sum of £38 2s. was paid in, which enabled Allport to draw a cheque for £30 in order to discharge the workmen's wages. Therefore Allport paid the money for the purpose of the business. In my opinion, the true inference is that the money which was borrowed for wages was paid in to the defendants' banking account, and was applied in payment of wages. The question is whether the plaintiff can recover that money from the defendants. It is contended on behalf of the defendants that he cannot, on the findings of the county court judge to which I have referred, and also on a further finding, that Allport borrowed the money for his own purposes, in order to replace money belonging to the defendants which he had abstracted. I was at first somewhat embarrassed by that finding; but on consideration I have come to the conclusion that it does not affect the legal position of the parties. Allport has paid the money in to the defendants' banking account; and either it is there now or it has been paid in wages to the defendants' workmen. The latter, I think, is the true inference; but in either case I think the result is the same. Suppose that Allport had paid the money direct to the workmen, and had asked the defendants to repay him, could the defendants have refused? It seems to me, that if the wages had been so paid, then, when the defendants had discovered the fact of payment, they must have either repudiated such payment or adopted it. By accepting the benefit of the payment they would adopt it. It comes to this, that either the workmen have been paid or they have not. If

they have been paid, the money so paid was in contemplation of law money received by the defendants to the use of the plaintiff; for either they have ratified the payment, or, if the money is still in their bank, it is the money of the plaintiff. I am of opinion that the decision in *Marsh v. Keating*, 1 Bing. N. C. 198, supports this view. In that case the money sought to be recovered was the proceeds of the fraud of Fauntleroy. The defendants, who had been Fauntleroy's partners, knew nothing of the fraud; but the judges who advised the House of Lords expressed a unanimous opinion that it must be treated as money received by the defendants to the use of the plaintiff, because it came into the possession of the defendants. The same view applies to the present case. Further than this, the defendants have since had an opportunity of finding out that the money had been paid in to their account. For these reasons I am of opinion that this sum of £20 was money received by the defendants to the use of the plaintiff. I will not say what the result might have been if the money had been paid in to the bank under some binding contract between Allport and the defendants. However it was paid in, it has found its way into the possession of the defendants, and therefore it was money received to the use of the plaintiff, which he is entitled to recover, and the appeal must be allowed.

COLLINS, J. I am of the same opinion. I need hardly say that I should not differ from the view taken by the learned county court judge without full consideration; but in this case I am satisfied that the judgment is wrong. The money in question was obtained from the plaintiff on the security of a cheque signed by Allport per procuration for the defendants, Rigby & Co. By the terms of s. 25 of the Bills of Exchange Act, 1882, it was apparent on the face of the cheque that the authority of the person signing the cheque was limited. I can entertain no doubt, on examination of the account, that this sum of £20 found its way to the credit of the defendants' account at the bank. The question for our determination is whether the plaintiff can maintain an action to recover that sum. If, instead of giving a cheque, Allport had asked the plaintiff to pay the workmen, and the plaintiff had done so, could not the plaintiff have maintained an action against the defendants to recover what he had paid? I am of opinion that he could; for what he did would have been a payment of the defendants' debt. On that state of facts, therefore, the plaintiff would be entitled to recover. Then does it make any difference that the money went into the bank? I think not; for the effect of the transaction could only be rendered different if the money were paid in by virtue of some contract which was binding as between Allport and the defendants; but there was no such contract. and there had been no change of position before the defendants knew the facts. The question is whether, now that they have found out Allport's defalcations, the defendants can keep the plaintiff's money. I

am of opinion that the cases which have been referred to in argument, *Marsh v. Keating*, 1 Bing. N. C. 198, and *Calland v. Loyd*, 6 M. & W. 26, go the full length of shewing that they cannot, and, in my opinion, the present is an à fortiori case.

Appeal allowed. Leave to appeal granted.

FIRST BAPTIST CHURCH OF ERIE v. CAUGHEY ET AL.,
ADMINISTRATORS.

SUPREME COURT OF PENNSYLVANIA, 1877.

[85 *Pennsylvania State*, 271.]

ERROR to the Court of Common Pleas of Erie County: of October and November term 1877, No. 145.

Assumpsit by S. S. Caughey and H. B. Fleming, administrators of Joseph Neeley, deceased, to recover the amount unpaid, with interest, on the following note:—

\$900.

ERIE, December 24, 1867.

On the 1st day of February, 1869, we promise to pay, to the order of Joseph Neeley, nine hundred dollars; it being for the use of First Baptist Church. Value received.

W. J. F. LIDDELL,
HORACE L. WHITE,
JAMES D. ROSS,
SAMUEL Z. SMITH,

Trustees of the First Baptist Church, Erie, Penna.

The remaining facts are sufficiently stated in the opinion of this court.¹

Mr. Justice MERCER delivered the opinion of the court, January 7, 1878.

All the assignments of error may be answered in the consideration of two questions,—the one whether the corporation had the power to incur the alleged liability;² the other whether there was sufficient evidence to submit to a jury that the liability was actually incurred.

1. The original charter declares one of the objects of the association to be “the building of a meeting-house, and settlement and support of a pastor or minister of the gospel for the worship of Almighty God, and the religious instruction of the congrega-

¹The balance of the statement of the case, including the charge of the court appealed from, omitted.—Ed.

²As to the liability of a corporation in quasi-contract for benefits received from *ultra vires* transactions, see *post*.—Ed.

tion, . . . together with that of the purchase and tenure of such lands or lots as may be necessary and convenient for the site of a meeting-house, of a burial-ground, and of a parsonage house of convenient size for their minister." A supplement to the charter gives the corporation power to assess and collect a tax on the pews; but not to exceed in any one year twenty per centum upon a fixed valuation, for the purpose of defraying the expenses of repairs, insurance and minister's salary, together with incidental expenses. The charter is silent on the subject of borrowing money.

Some thirty years after the corporation was formed, the church edifice became unsuitable and inadequate for the enlarged congregation. It therefore resolved to rebuild and enlarge the meeting-house. This required an expenditure beyond the sum subscribed by voluntary contributions, for that purpose. The meeting-house was rebuilt. Had the corporation power to contract a debt in rebuilding beyond the amount subscribed? We think it had. The object of its incorporation could not be fulfilled without the meeting-house. No clause in its charter forbid its contracting a debt in the erection of its necessary buildings. Whether it hired laborers and bought materials on a credit, or whether it borrowed money with which to pay for the labor and materials when procured, the liability incurred was for the same purpose. As it could not have successfully defended against the wages of a laborer employed in the erection of the house through want of power to employ him, so it cannot defend against the payment of money borrowed and actually expended in the erection of the church. As to the policy of a church erecting a house of worship far beyond its available means, we do not now feel it necessary to indicate an opinion. Certain it is, that the small sum here in controversy is trifling compared with the large debts resting upon many of the churches in towns and in cities.

2. The charter declared the business and affairs of the association should be under the direction and management of five trustees, a majority of whom should constitute a quorum. It further declared the trustees should "have the general care, superintendence, and management of the concerns of the same."

During the progress of the work, Mr. Liddell, one of the trustees, appears to have been the financial agent and manager, in behalf of the board of trustees. In raising the funds necessary, he borrowed \$1,200 from Mrs. Smith, and gave his individual note therefor. Subsequently the trustees borrowed \$900 of Joseph Neeley, to pay so much of the debt due to Mrs. Smith, and four of them executed and delivered the note for the sum thus borrowed. The court doubted the power of the plaintiff in error to give the note, and the consequent liability of the corporation thereon alone; but substantially charged that there were certain implied powers incident to every corporation, and if they were satisfied, from the evidence, that the money for which the note

was given was actually used in rebuilding the church, and thus went to the benefit of the society, the law raised an implied obligation on the part of the church to repay it. It was contended on the argument that there was no evidence that the money was used in rebuilding the church. The answer to this objection is shown in several parts of the record. The note itself contains the written declaration of four of the trustees jointly, when engaged in making the loan, that the \$900 were "for use of First Baptist Church." The settlement which Liddell subsequently made, as appears by the receipt signed by the president of the board of trustees, and one other trustee, declares, "We hereby assume all liabilities of said church for which said W. J. F. Liddell as trustee has become responsible, including note given to Mrs. Catharine Smith, signed by himself individually, for the use of said church, according to settlement made this day." On the trial of the cause, James Dunlap, president of the board of trustees, was called, by defendants in error, as a witness, and in his testimony in chief said, "in repairing church had to borrow money; were advised by counsel that church could not borrow it; must be individual; the money borrowed from Neeley was paid to Mrs. Catharine Smith, to discharge a debt to her for money borrowed by Mr. Liddell for the church." It is true, on cross-examination, his evidence goes to impair the validity of the receipt to which his name was subscribed, and he further said "none of the Neeley money was received by the church." I think the fair interpretation of his testimony is that the money was not actually paid into the hands of the trustees, but was paid directly by Neeley to Mrs. Smith. It was, however, a question for the jury to determine. It is further shown by the evidence that the plaintiff in error made a payment of \$300 on the note given to Neeley; the indorsement thereof being in the handwriting of the treasurer, now deceased, of the corporation.

This chain of evidence, both written and verbal, tending to show how the business was conducted and settled, ratified by a partial payment, was certainly sufficient to submit to the jury to find that the money was used in rebuilding the church.

*Judgment affirmed.*¹

"One who takes such a bill or note in exchange for goods, money or other consideration, may repudiate the bill or note and charge the firm upon an equitable liability, or quasi-contract for the value of the consideration furnished. *First Church v. Caughey*, 85 Pa. 271.

"So, also, one who takes such a bill or note in satisfaction of a claim against a partnership, may repudiate the bill and charge the partnership upon the old claim. *Turnbow v. Brooch*, 12 Bush, 455 (approved in *Williams v. Rogers*, 14 Bush, 276); *Perrin v. Keene*, 19 Me. 355; *Goodspeed v. South Bend Co.*, 45 Mich. 237; *Patterson v. Camden*, 25 Mo. 13; *Gardner v. Conn.*, 34 Oh. St. 187; *Seward v. L'Estrange*, 36 Tex. 295; *Parker v. Cousins*, 2 Grat. 372." *Ames' Cases on Partnership*, 498 (last two paragraphs). See note to previous case.

RAILROAD NATIONAL BANK v. CITY OF LOWELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

[109 *Massachusetts*, 214.]

CONTRACT to recover \$3397 as money had and received to the plaintiff's use. The case was submitted to the judgment of this court on the following statement of facts:

In 1864 Thomas G. Gerrish was chosen treasurer of the defendants, held the office by successive annual elections, and discharged the duties thereof until after March 10, 1869. During all this time he, as treasurer, had an account with the plaintiffs and with no other bank, under an arrangement between the parties that the accounts of the defendants should be kept there. In each of the years 1865, 1866, 1867 and 1868, the city council authorized him to borrow money of the plaintiffs in anticipation of the collection of taxes, and the sums so borrowed were always repaid with interest. In March 1869, Gerrish was a defaulter to the defendants as treasurer, to the amount of \$30,000, but the fact was unknown to the parties to this action, and on the evening of March 9 a resolution, authorizing him to borrow \$130,000 from the plaintiffs, in anticipation of the collection of taxes for that year, was introduced into the common council, read once, and ordered to a second reading.

On the morning of March 10, 1869, at which time the amount standing to the credit of Gerrish as treasurer, in the plaintiff's hands, was \$2674, he stated to the plaintiff's cashier that the necessary authority to borrow money had been granted the evening before, that the papers were not executed, and that he wished to overdraw his account. He therefore, without the knowledge of the defendants, or any special authority from them, presented to the plaintiffs a check signed by himself as city treasurer, payable to his own order, and indorsed by him, for \$5000, received the money therefor from the plaintiffs, placed the same in the cash-drawer where he kept the defendants' money, with "a small sum, exceeding \$100," remaining there after the business of the preceding day: and from the money there he paid during the same day, to various creditors of the defendants, upwards of \$4900. The rest of it was left there, and came into the possession of the defendants. He afterwards on the same day drew

In *Grand R. B. Co. v. Rollins* (1889) a *de facto* corporation was held liable for labor and services of which it had the benefit. To quote the court: "After the corporate capacity had become complete, the plaintiff passed upon and allowed the defendants' account embracing these items, and, if this had not been done, it having accepted and appropriated the fruit of Rollins' labor and money, the law would imply a promise to pay for the same."—*Ed.*

another check upon the plaintiffs, signed by himself as city treasurer, payable to bearer, for \$1072, to pay a debt due from the defendants to a gaslight company, which check was presented to the plaintiffs by the company and paid on the same day.

On March 11, 1869, Gerrish resigned his office. He never kept a private account with the plaintiffs. Demand was made on the defendants on March 12, 1869.

WELLS, J. That the city is not liable for the money as a loan, because it was advanced to its treasurer or paid upon his checks, is fully settled by the decisions in *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 Allen, 528; and *Dickinson v. Conway*, 12 Allen, 487.

It was also decided in *Kelley v. Lindsey*, 7 Gray, 287, that money advanced on account of the defendant to one in his employ, but who had no authority to borrow money for him, created no debt against the defendant, although advanced for the purpose of being expended in his business and to pay his debts, and actually so applied. That decision appears to us to be conclusive against the plaintiff in this case.

In *Dill v. Wareham*, 7 Met. 438, cited by the plaintiff, the money was paid into the treasury of the town in pursuance of a contract made by authority of a vote of the town.

In *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, and *Skinner v. Merchants' Bank*, 4 Allen, 290, the money came into the actual possession and control of the defendant bank. The legal possession of money received by the officers of a bank, in the usual mode, is in the corporation, and not in the officers in whose charge and manual control it is intrusted. *Commonwealth v. Tuckerman*, 10 Gray, 173.

The treasurer of a city or town is an independent accounting officer, by statute made the depository of the moneys of the city or town. Gen. Sts. c. 18, §§ 54, 59; c. 19, § 2. The legal possession of the specific moneys in his hands, from whatever source, is in him. *Hancock v. Hazzard*, 12 Cush. 112. *Coleraine v. Bell*, 9 Met. 499. All moneys of the city or town he holds as its property, and exclusively for its use. But he holds them by virtue of his public official authority and duty, and not merely as the agent or servant of a corporation.

The fact that the money in this case went into the hands of the treasurer, and was placed in the drawer provided by the city for his use in keeping the funds of the city, is not enough to charge the defendant with liability.

The result is, therefore, that the defendant is entitled to judgment.

GEORGE H. BILLINGS v. INHABITANTS OF MONMOUTH.

SUPREME JUDICIAL COURT OF MAINE, 1881.

[72 *Maine Reports*, 174.]

ON exceptions and motion for a new trial.

Assumpsit on three promissory notes signed "William G. Brown, Treasurer;" also for money had and received.

Plea was general issue, and statute of limitations was set up under a brief statement.

The verdict was for \$3,004.81.

The exceptions relate to the admission in evidence of the notes declared upon, of certain other notes, and of the records, accounts, and settlements with the treasurer of the defendant town. Exceptions were also taken to the part of the charge to the jury given below:—

"Now a question is raised here in the very beginning whether these notes are the notes of the town, or the notes of the treasurer. I do not deem it necessary to state in regard to that now. I do not care to state it for the reason that there are several actions pending, in which that very question will be raised and will be finally settled by the law court. And it is sufficient for me to say to you, that those notes were not authorized by any vote of the town. . . . That lays the notes out of the case;"—and to other parts of the charge covering several pages.

BARROWS, J. The defendants' objections to the reception in evidence of the notes sued, and certain other notes and renewals thereof, which were claimed by plaintiff in one phase of the case to constitute the consideration of the notes in suit, and like objections to the records of the doings of the town at various town meetings, between 1862 and 1872, and to the reports of the town treasurer at its annual meetings, from 1865 to 1877 inclusive, all accepted by the town, and to the settlements of the treasurer with the selectmen, if said objections could be supposed in any view of them to possess merit, became altogether immaterial, when the presiding judge, with full instructions as to the effect of a want of authority upon the validity of the notes, peremptorily instructed the jury that "these notes were not authorized by any vote of the town, that they were not ratified, that there was nothing in the case which would authorize any such inference," and finally, that "that lays the notes out of the case, and brings us to the other count, that for money had and received."¹

The defendants' counsel insists in argument upon the refusal of

¹A portion of the opinion relating to the admissibility of evidence has been omitted.—ED.

the presiding judge to rule upon the question, whether the notes were in form notes of the town, or notes which could bind the treasurer only. If the instructions to the jury had permitted a recovery upon the notes in any contingency, that inquiry would seem to be pertinent. But they did not. The notes were "laid out of the case," and the plaintiff's right to recover was made to depend upon his establishing what was necessary to entitle him to a verdict upon the count for money had and received. The testimony tending to show authority or ratification was weighed and found wanting. After this, there was no occasion to pass upon the construction of the notes, any more than there was in *Parsons v. Monmouth*, 70 Me. 264.

That any negotiable paper, made by the officers of a town in the transaction of its ordinary business, not proceeding under special authority conferred by some statute, will be subject, even in the hands of a *bona fide* indorsee, to all equitable defences that might be made against the original promisee, is well settled in this State, as appears in the case last named, and the cases there cited.

And the plain doctrine of *Bessey v. Unity*, 65 Me. 342, and *Parsons v. Monmouth*, is that the holder of such paper who has lent money upon the representation of town officers that it was wanted for municipal use, must go farther and show the appropriation of the money lent to discharge legitimate expenses of the town, unless he can show that such officers were specially authorized, by vote of the town at a legal meeting, to effect the loan. The case at bar seems to have been tried in careful conformity with these rules. The fallacy of the greater part of the defendants' argument upon the exceptions consists in ignoring the fact that "the notes were laid out of the case."

It is strongly implied in the two cases last above cited that money thus advanced and shown to have been actually appropriated to the discharge of legal liabilities of the town, would be held recoverable in an action for money had and received against the town. We see no good reason to excuse the town from refunding it when it has been actually thus appropriated. The plaintiff by such proof brings his case fully within the principles that govern the action for money had and received. He shows his money received and appropriated by the agents of the town to the legitimate use of the town, and in such case the want of an express promise to repay it will not defeat the action. The law will imply a promise, sometimes, even against the denial and protestation of the defendant. *Howe v. Clancey*, 53 Me. 130.

It is the payment of the lawful debts of the town by its own agents with the plaintiff's money which constitutes the cause of action.

To allow a recovery by the plaintiff of whatever sum he can show has thus inured to the benefit of the town, is a more compendious mode of settling the controversy than the English method of subrogating the lender of the money to the rights of the perhaps numerous corporation creditors, who have been paid with the funds procured without

authority,—a mode of doing justice which manifestly tends to a multiplicity of suits, when, for aught we see, the proper result may be reached, at all events with the assistance of an auditor, in a single action.

Looking at the issue which was in fact presented to the jury, it will be seen that defendants' counsel is in error in supposing that if the presiding judge had ruled that if the notes were in form the individual notes of Brown, "that would have ended the conflict and the plaintiff would have been nonsuited."

The plaintiff offered testimony tending to put his case upon another footing than that of *Parsons v. Monmouth*, and hence all the evidence which had a tendency to show that plaintiff's money was used for the payment of some legitimate indebtedment of the town was strictly relevant; and the instructions (of some of which the defendants complain) were appropriate to direct the attention of the jury to that which was the chief subject of inquiry. Thus it is obvious that the deficiency in the town treasurer's accounts was of importance only upon the question, what was done with the plaintiff's money, and as it might bear upon that question, the presiding judge called the attention of the jury to it. The defendants surely have no cause of complaint that he did so, nor that he required the jury carefully to ascertain such facts as were necessary to determine whether the old notes which (it was claimed) were paid with this money were barred by the statute of limitations, and whether, if the plaintiff's money was paid to discharge them, they represented not only just but legal claims against the town.

The vital question of fact, whether the plaintiff's money had actually been applied by the town officers to the extinguishment of legal claims against the town, was settled by the jury against the defendants. The jury found that it was so applied. The testimony produced by the plaintiff, if believed, justified the finding, and there is nothing in its character or in that of the accounts produced which decisively stamps it as untrue. There is an apparent error of a few dollars in the reckoning of interest. When the plaintiff has cured this by a *remittitur*, the entry will be

Motion and exceptions overruled.

APPLETON, C. J., WALTON, VIRGIN, LIBBEY, and SYMONDS, JJ., concurred.¹

¹"In recent cases in this State it has been held, that when selectmen have acted without special authority in procuring loans of money for municipal purposes, if the lender would recover in an action of assumpsit against the town the amount of the loans, he must prove not only that the money was received by the selectmen in their official capacity but also that it was applied by them to the use for which it was obtained, to meet and discharge existing municipal liabilities, *Billings v. Monmouth*, 72 Maine, 174; that towns themselves by the statutes organizing them are strictly limited in the exercise of

TAYLOR v. HARE.

COMMON PLEAS, 1805.

[*Bosanquet & Puller, New Reports*, 260.]

THIS was an action for money had and received, which came on to be tried before the Lord Chief Justice at the sittings after last Hilary term, when a verdict was found for the plaintiff for £425, subject to the opinion of the court upon the following case:

On the 12th of September, 1791, the defendant took out a patent for the invention of an apparatus for preserving the essential oil of hops in brewing. By articles of agreement, dated 5th of November, 1792 (which were set out at length at the end of the case), and made between the defendant of the one part, and the plaintiff and his said late partner of the other part, reciting the defendant's patent, and that it gave him the sole power, privilege, and authority of using, exercising, and vending his said invention for the term of fourteen years, the defendant granted to the plaintiff and his said late partner the privilege of making, using, and exercising the said invention for the residue of the said term of fourteen years, and in consideration thereof the plaintiff and his partner covenanted that they would secure to be paid to the defendant during the said term an annuity of £100, and would give their bond for that purpose, and a bond was accordingly given, conditioned for the payment of the said annuity. The plaintiff and his said partner used the apparatus (for making and preparing of which they paid a distinct price) from the date of the said agreement until the 25th day of March, 1797, and during all that time regularly paid the said annuity to the said defendant. The defendant was not the inventor of the invention for which he obtained his patent. The invention was not new as to the public use and service

the powers of borrowing and appropriating money, *Hooper v. Emery*, 14 Maine, 375; *Parsons v. Monmouth*, 70 Maine, 264; *Minot v. West Roxbury*, 112 Mass. 1; that selectmen do not possess by virtue of their office a general authority to hire money upon the credit of the town, *Bessey v. Unity*, 65 Maine, 347; that some action of the town, the body corporate, within the scope of its corporate powers, is required to confer prior authority to borrow money in its name; and if a liability is alleged on the ground that the plaintiff's loan was one the municipality had a legal right to procure and that, though its officers did not act with authority at the time, it has subsequently availed itself of the money loaned by accepting its application to the payment of municipal debts, it is for the plaintiff to prove the facts which support the allegation." *Lincoln v. Stockton* (1883) 75 Me. 141, 144, 145.

For a discussion of the principle underlying recovery in quasi-contract against municipal corporation, see a careful, accurate and digest note on the subject in 4 *Columbia L. Rev.* 67-68,—Ed.

thereof in England, but it was the invention of one Thomas Sutton Wood, and had been publicly used in England by said Wood and others before the defendant obtained his patent. But the patent had never been repealed. The amount of the annuity which they had paid was £425. If the court should be of opinion that the plaintiff was entitled to recover back the money which was paid on the bond, the verdict was to stand. If the court should be of a contrary opinion, a nonsuit was to be entered.

Bayley, Serjt., for the plaintiff. To support the present action it is not necessary to prove that any imposition has been practised. If it appear that the plaintiff has received nothing in return for the money which he has paid, he is entitled to recover back his money in this form of action. He was induced to pay his money upon the supposition that the defendant had the power of communicating some privilege. But it now appears that the defendant's invention was not new, and that the patent was therefore void, the consideration upon which the plaintiff paid his money has wholly failed, and the plaintiff has derived no benefit whatever. Where an estate is conveyed, the vendor professes to convey nothing but his title to that estate. But here the thing itself which was the subject of the agreement had no existence. It was the understanding of all parties that the defendant was entitled to a patent-right; but it now turns out that they were mistaken; the plaintiff therefore is entitled to recover the money which he has paid under a mistake. He had a right to make use of the invention without paying anything for it. The defendant has no right to the annuity, and indeed he has already failed in an action on the bond in which the validity of the patent was put in issue.

Sir JAMES MANSFIELD, C. J. (stopping *Cockell*, Serjt., for the defendant). It is not pretended that any action like the present has ever been known. In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; *non constat* what advantage he made of it; for anything that appears he may have made considerable profit. These persons may be considered in some measure as partners in the benefit of this invention. In consideration of a certain sum of money the defendant permits the plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him. How then can we say that the plaintiff ought to recover back all that he has paid? I think that there must be judgment for the defendant.

HEATH, J. There never has been a case and there never will be, in which a plaintiff, having received benefit from a thing which has

afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. The plaintiff has had the enjoyment of what he stipulated for, and in this action the court ought not to interfere, unless there be something *ex æquo et bono* which shows that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money. In the case of Arkwright's patent, which was not overturned till very near the period at which it would have expired, very large sums of money had been paid; and though something certainly was paid for the use of the machines, yet the main part was paid for the privilege of using the patent-right, but no money ever was recovered back which had been paid for the use of that patent. I am therefore of opinion that judgment of nonsuit should be entered.

Judgment of nonsuit.

IN *Marston v. Swett* (1876) 66 N. Y. 206, 210, EARL, J., delivering the opinion of the court, said:

It is claimed by the defendants that the agreement is void for want of a consideration, in that the patent was invalid. This defence is very imperfectly set up in the answer, but the pleader evidently intended to set it up, and, therefore, we will assume that it is sufficiently pleaded. It is sufficiently established by the judgment in the United States Circuit Court, in an action in which these defendants were plaintiffs, and this plaintiff and others defendants. That judgment established the fact that this patent was wholly void, invalid and of no effect, for the reason that Elizabeth Hawks, the patentee, was not the original and first inventor of the improvement patented. That judgment was not set up in the answer, but the invalidity of the patent was alleged, and the judgment was, therefore, properly received in evidence to prove the allegation, assuming that the allegation itself was material. *Bouchaud v. Dias*, 3 Den. 238; *Castle v. Noyes*, 14 N. Y. 329; *Rinchey v. Stryker*, 28 *id.* 45. The judgment in such a case is received in evidence, not as a bar of itself to a recovery, but as proof to establish a material fact in controversy. The invalidity of the patent being thus established, the further material point to be considered is, whether that furnished a defence to

this action. I am of opinion that, upon the facts of this case, it did not.

The plaintiff and defendants were tenants in common of the patent, all believing it to be valid. Each had the right to manufacture and to license others to manufacture under it. *Clum v. Brewer*, 2 Curtis, 506. The defendants desired the exclusive right to use the invention, and hence made this agreement with the plaintiff. Under it, they actually enjoyed the exclusive right which they sought, and the plaintiff gave up all right to manufacture or to license others to manufacture. There was no fraud, and the defendants got all they bargained for. During the time mentioned in the complaint, they enjoyed all they could have had if the patent had been valid. Under such circumstances, there was abundant consideration to uphold the agreement, whether the patent was valid or invalid.

The parties held a patent, which was respected as valid by everybody. They enjoyed a monopoly of the invention. They could manufacture the patented article without competition; and the possession of the patent, apparently valid, enabled them to license others, for a consideration, to use it. In consideration of defendants' promise, the plaintiff gave up all the advantage he thus had, and the defendants, by virtue of the agreement, enjoyed the exclusive monopoly. Here there was injury to one party, and benefit to the other, either of which is sufficient to furnish a consideration for a promise. *Miller v. Drake*, 1 Cai. 45; *Converse v. Kellogg*, 7 Barb. 590; *Freeman v. Freeman*, 43 N. Y. 34. Suppose there had been no patent whatever, and the defendants had promised the plaintiff to pay him fifty cents upon every stove which they manufactured, in consideration that he would not, during a given period, manufacture any. The plaintiff having the right to manufacture, and having abstained from its exercise, would any one question that there would be a sufficient consideration to uphold this promise of the defendants?

There are several English cases holding that the invalidity of the patent is no defence to such an action as this to recover license fees for the term the patent was actually used under the license. *Taylor v. Hare*, 1 N. Rep. 260; *Lawes v. Purser*, 88 Eng. C. L. R. 929; *Noton v. Brooks*, 7 Hurlst. & N. 499; *Baird v. Neilson*, 8 Cl. & Fin. 726; *Crosley v. Dixon*, 10 H. Lords Cases, 293; *Chanter v. Dewhurst*, 12 M. & W. 823; *Lawes v. Purser*, 38 Law & Eq. R. 48; see also *Hindmarch on Patents*, 245. To the same effect is *Bartlett v. Holbrook*, 1 Gray, 114, and also *Marsh v. Dodge*, 4 Kern. 279. The case of *Saxton v. Dodge*, 57 Barb. 84, has some features like this case, but many more unlike it. There the licensees of the patent did not get all they bargained for, and they were induced to enter into the contract by fraud.

It is the settled law of this and several other States that the invalidity of the patent is a defence to an action for the purchase-

price of the same, on the ground of a failure of the consideration. *Cross v. Huntly*, 13 Wend. 385; *Head v. Stevens*, 19 *id.* 411; *McDougall v. Fogg*, 2 Bosw. 387; *Dunbar v. Marden*, 13 N. H. 317; *Geiger v. Cook*, 3 Watts & Serg. 270; *Darst v. Brockway*, 11 Ohio, 471; *McClure v. Jeffrey*, 8 Ind. 82; *Mullikin v. Latchem*, 7 Blackf. 136. It is therefore argued on behalf of the defendants that such an agreement as this, for the exclusive use of a void patent, which is a less interest than an assignment of the entire patent, is without consideration. This conclusion is not altogether legitimate. Where one bargains for a patent right he expects a monopoly, and something which he can use, sell and deal in during the entire term of the patent, to the exclusion of every one else. He bargains for something which he does not get, and cannot enjoy, if the patent is invalid. He gets nothing, the vendee parts with nothing, and there is an entire failure of consideration. But where one has a void patent which he can use, and give others the right to use, and thus has an advantage which is valuable to him, and another bargains for that advantage which he surrenders and the other enjoys, the latter, during the time he is permitted to use the patent unmolested, gets just what he bargained for, and cannot complain. When a case shall be presented where, in good faith, a void patent has been sold, and the vendee has enjoyed the monopoly for the whole term of the patent, without molestation or liability to account to any one claiming a superior right, it will be proper to consider whether, upon principle, there has been a failure of consideration, and whether such a case should be controlled by the authorities above cited. There is no doubt as to what would be decided by the English courts in such a case. *Hall v. Conder*, 89 Eng. C. L. R. 22. In this case the defendants had enjoyed the monopoly which they bargained for, without liability to account to any one except the plaintiff. They are not liable to account to the owners of the Lordfellow patent for the term prior to its issue. *Gayler v. Wilder*, 10 How. (U. S.) 477.

The plaintiff's claim was therefore undefended, and the court erred in ordering judgment for defendants upon their counter-claim. It is true that the counter-claim was not sufficiently denied by the reply, and judgment might have been ordered for the plaintiff for the balance of his claim, after deducting the amount of the counter-claim; but a new trial should be granted, and it is hoped that the very imperfect pleadings will be so reformed before another trial as to present truly the precise issues which the parties desire to try.

Judgment should be reversed and new trial granted, costs to abide event.¹

All concur. FOLGER, J., absent.

¹And see the same case at a later stage. *Marston v. Swett* (1880) 82 N. Y. 526. See also for New York law, *Hyatt v. Ingalls* (1891) 124 N. Y. 93; *Denise*

SHEARER v. FOWLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1810.

[7 *Massachusetts*, 31.]

THE declaration, which was in case, contained four counts. The last count, upon which alone any question came before the court, was for money had and received by the defendant for the plaintiff's use.

At the trial of the action before SEDGWICK, J., at the last April term in this county, the plaintiff offered to prove, in support of his said count, that in consideration of the deed made by Abigail Fowler, the defendant's wife, as the attorney of her husband and in her own right (which deed is described in the case of *Fowler v. Shearer*, ante page 14), of certain premises which the husband and wife held in her right, he, the plaintiff, paid to the defendant one hundred and sixty dollars, and gave his promissory note for two hundred dollars, to recover back which money so paid was the purpose of this count. The evidence was rejected by the judge, and for that cause the plaintiff moved for a new trial, and the action stood continued upon that motion to the present term.

Ashmun, of counsel for the plaintiff, considered this point as settled by the decision in the action before referred to, wherein the present defendant was plaintiff, and the now plaintiff was defendant.

v. Swett (1893) 22 N. Y. Supp. 950; and an excellent digest article on licenses under an invalid patent, 13 Albany L. J. 410.

For the law in general, compare the following cases: *Lawes v. Purser* (1856) 8 E. & B. 930; *Clark v. Adie* (1887) L. R. 2 App. Cas. 423; *Jones v. Burnham* (1877) 67 Me. 93; *Standard Button Fastening Co. v. Ellis* (1893) 159 Mass. 448; *Schwartzenbach v. Odorless Co.* (1885) 65 Md. 34; *Day v. Kellogg* (1870) 1 Mich. (N. P.) 173; *Darst v. Brockway* (1842) 11 Oh. 462. And see an article on this subject in 56 Albany L. J. 259; *Walker on Patents* (4th ed.) 266.

In *Standard Button Fastening Co. v. Ellis*, *supra*, the court said: "A license imparts no warranty that the patent is valid, and no case has been found which holds that a covenant for quiet enjoyment of the right to use the invention is implied. The analogy to a lease of land is not very close. A license to use a patented invention gives permission to make such use as far as that can be done without infringing other patents. Where a grant of an exclusive right is made, if the exclusive right fails, the consideration of the grant fails. *Harlow v. Putnam*, 124 Mass. 553. But where a mere license is given, it is held that there is no failure of consideration till the licensee is actually prevented from using the invention. *Marston v. Swett*, 82 N. Y. 526; *Angier v. Eaton*, 98 Penn. St. 594; *Jones v. Burnham*, 67 Maine, 93; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *White v. Lee*, 14 Fed. Rep. 789; *Corell v. Bostwick*, 39 Fed. Rep. 421; *Robinson on Patents*, § 1251."—Ed.

Bliss, for the defendant, thought this a different question, and so, he said, did the court: for, in delivering the opinion of the court, in that action, the chief justice, putting the supposition that "the defendant there had paid the consideration money, and brought his action to recover it back as paid by mistake," observes that "a different question would have arisen, involving different considerations."

Here the plaintiff voluntarily paid the money, and although he was mistaken as to the legal effect of the deed for which he paid it, he has no right to reclaim it. It was a mere mistake of the law: all the facts of the case were as well known to him at the time the transaction took place, as they have been since.

CURIA. The principles of law applicable to this case, seem to be well settled. Whenever money is paid in consideration of a contract, which contract is void for want of power in one of the parties, or for any cause, other than fraud or illegality in the contract, natural justice dictates that the money so paid shall be refunded; and there is no principle of law to prevent the operation of so equitable a rule. Here the deed, for which the money demanded in this action was part of the consideration, has been adjudged void; and in that action a promissory note, which was another part of the consideration of the same deed, has been avoided as *nudum pactum*, because the deed failed. No cause can be assigned why the money, which was actually paid, should remain in the hands of the party who still holds the property for which this money was paid. The evidence ought therefore to have been admitted. The verdict must be set aside, and a new trial granted.

SMOUT v. MARY ANN ILBERY.

EXCHEQUER, 1842.

[10 *Meeson and Welsby*, 1.]

DEBT for goods sold and delivered, and on an account stated.

At the trial before GURNEY, B., at the Middlesex sittings in Michaelmas term, 1841, it appeared that the plaintiff was a butcher, and the defendant the widow of James Ilbery, who left England for China in May, 1839, and was lost in the outward voyage, on the 14th October, 1839. The news of his death arrived in England on the 13th of March, 1840. The plaintiff had supplied meat to the family before Mr. Ilbery sailed, and during his voyage, and the supply continued down to the time of the news of his death, and even afterwards. Upon the 14th October, 1839, the day of Mr. Ilbery's death, the amount of the debt was £52 13s. 11d. Between that day and the arrival of the

news of the death, meat had been supplied to the amount of £19 9s.; and after that, the supply amounted to £6 7s.

The judgment of the Court was now delivered by

ALDERSON, B. This case was argued at the sittings after last Hilary term, before my Brothers GURNEY, ROLFE, and myself. The facts were shortly these. The defendant was the widow of a Mr. Ilbery, who died abroad; and the plaintiff, during the husband's lifetime, had supplied, and after his death had continued to supply, goods for the use of the family in England. The husband left England for China in March, 1839, and died on the 14th day of October, in that year. The news of his death first arrived in England on the 13th day of March, 1840; and the only question now remaining for the decision of the court is, whether the defendant was liable for the goods supplied after her husband's death, and before it was possible that the knowledge of that fact could be communicated to her. There was no doubt that such knowledge was communicated to her as soon as it was possible; and that the defendant had paid into court sufficient to cover all the goods supplied to the family by the plaintiff subsequently to the 13th March, 1840.

We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable, who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seems to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the courts have held, that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his lia-

¹The balance of the statement of facts, not material to the immediate question, is omitted.—Ed.

bility depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.

On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.

Of the first, it is not necessary to cite any instance. *Polhill v. Walter*, 3 B. & Ad. 114, is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice STONY, in his book on Agency, p. 226, note 3. The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part, no want of due diligence in acquiring knowledge of the revocation, no omission to state any fact within her knowledge relating to it; and the revocation itself was by the act of God. The continuing of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principle, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all; for *Blades v. Free*, 9 B. & C. 167; 4 Man. & R. 282, has decided, that in such a case the executors of the husband are not liable. This may be so; but we do not think that if it be so, it affords to us a sufficient ground for hold-

ing the defendant liable. In the ordinary case of a wife who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made.

Our judgment, on the present occasion, is founded on general principles applicable to all agents; but we think it right also to advert to the circumstance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract, therefore, made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that, in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him; and, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable under such circumstances as these.

For these reasons, we are of opinion that the rule for a new trial must be absolute; but as the point was not taken at Nisi Prius, we think the costs should abide the event of the new trial.

Rule absolute accordingly.

VALENTINI v. CANALI.

QUEEN'S BENCH DIVISION, 1889.

[*Law Reports*, 24 *Queen's Bench Division*, 167.]

APPEAL from the Woolwich County Court in an action remitted for trial from the Chancery Division in which the plaintiff claimed a declaration that a contract by which he agreed with the defendant to become tenant of a house, and to pay £102 for the furniture therein, was void, and the return of £68 paid by him on account, on the ground that he was an infant at the time when he entered into the contract. It appeared that the plaintiff had occupied the premises and used the furniture for some months. The judge found in the plaintiff's favour on the issue of infancy, declared the contract to be void, and ordered a promissory note given by the plaintiff for the balance due for the

furniture to be cancelled, but refused to order the return of the sum paid. The plaintiff appealed.

LORD COLERIDGE, C. J. I am of opinion that this appeal should be dismissed. Under the contract in question, which was one for his advantage, the plaintiff, an infant, undertook to pay the defendant a sum of money. He paid the defendant part of this sum, and gave him a promissory note for the balance. The judge satisfied himself that the plaintiff was an infant at the time when he entered into the contract, and, having satisfied himself of this, did, in my opinion, justice according to law. He set aside the contract, and he ordered the promissory note to be cancelled.

It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the re-payment of the sum paid by him to the defendant as money paid under a contract declared to be void. No doubt the words of s. 1 of the Infants' Relief Act, 1874, are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice. The defendant therefore could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right.

BOWEN, L. J., concurred.

*Appeal dismissed.*¹

¹Where the infant, avoiding the contract, has acquired and enjoyed an interest in property of a permanent nature with obligations attached to it, the infant is liable on a quasi-contract for the benefits received. *Blake v. Concannon* (1870) 4 Irish Rep. Common Law, 323; *Northwestern Railway Co. v. McMichael* (1850) 5 Ex. 114 (per PARKE, B.); *Hamilton v. Vaughan-Sherin, etc.* (1894) L. R. [1894] 3 Ch. 589; *Holmes v. Blogg* (1818) 8 Tantt. 508 (as explained in *Corpe v. Overton* (1833) 10 Bing. 252); *Johnson v. N. W. Ins. Co.* (1894) 56 Minn. 365.

These cases are to be found in Smith's Cases on the Laws of Persons, to which reference is made.—ED.

*(b) Mistake as to the Subject Matter of a Contract.**(1) Mistake as to its Existence or Identity.*

BREE v. HOLBECH.

IN THE KING'S BENCH, MAY 18, 1781.

[2 *Douglas*, 654.]

IN an action of assumpsit for £2000 had and received to the plaintiff's use,—The defendant having pleaded the general issue, and the statute of limitations,—the plaintiff replied: That the writ was sued out on the 22d of August, 1780; that, on the 18th of February, 1773, the defendant asserted and affirmed that there was an indenture of mortgage, dated the 24th of June, 1768, made or mentioned to be made, between F. and S. of the one part, and W. H. (the defendant's uncle) on the other, for a term of years, granted to the said W. H. as a security for the payment of £1200 with interest; that the defendant then further asserted and affirmed, that, after making the said indenture, W. H. died; that the defendant was his administrator with the will annexed, and there was due to him, as administrator, the said principal sum on the said security, that the plaintiff, relying on these assertions and affirmations, advanced £1200 to the defendant, on his executing an indenture of assignment on the said 18th of February, 1773, which recited the mortgage, and purported, for the consideration of the £1200 so advanced, to assign all the premises by the said recited indenture of mortgage granted, for the remainder of the term, subject to the original power of redemption; that, in this indenture of assignment the defendant agreed with the plaintiff, that neither the said W. H. nor the defendant had done any act to incumber the mortgaged estate; that the said several assertions and affirmations of the defendant, and also the recitals in the said indenture of assignment, were false, inasmuch as there never was any such indenture of mortgage, nor the sum of £1200 nor any other sum, due to the defendant, as administrator of W. H. on such security, in the manner the defendant had asserted and affirmed, and as in the indenture of assignment was recited, or in any other manner; and that neither the premises nor any part thereof passed by the assignment to the plaintiff, nor did any estate, right, or title therein, or to the said sum of £1200 vest in him; that, by fraud and imposition, and by

means of the said false assertions and affirmations, and false recitals, the plaintiff was induced to pay the said sum of £1200 on the execution of the said indenture of assignment; that, at the time of the execution thereof and of paying the money, the plaintiff was ignorant of the falsehood of the said assertions, affirmations, and recitals, and of the fraud so practised upon him, and did not discover them till within the space of six years next before suing out the writ. To this replication, the defendant demurred generally. The case was, this day, argued by *Hill*, Serjeant, for the plaintiff; and *Chambre*, for the defendant.

Chambre, in support of the demurrer, contended, that there was nothing alleged in the replication which could take the case out of the statute. There was no fraud stated to have been practised by the defendant; for it was not averred that he knew of the falsehood of the different assertions and recitals. But, if there had been fraud, that would not have been sufficient; it was the plaintiff's business to look to the validity of his security; and there is nothing relative to fraud among the different exceptions and savings in the statute.

Hill, Serjeant, insisted: 1. That, in point of law, this was fraud on the part of the defendant, although he himself might not know of the falsehood; 2. That, where a party has been induced, by fraud, to pay money, the statute of limitations does not run, or at least only runs from the time when the fraud is discovered.—1. The assertions of the defendant, he observed, were positive, without qualification, and therefore he made himself answerable for the truth of them; and, if any loss had been incurred by his mistake, it ought to fall upon him, not upon an innocent third person. On this first head, he cited, 1 Show. 68; 3 Mod. 261; Comb. 163; *Hearne's Pleader*, 102, 224; *Cro. Car.* 141; *Sir W. Jones*, 196; 2 Burr. 112; 12 Mod. 494; 2 Ves. 198—2. On the second point, he relied on *Booth v. Lord Warrington*, in *Dom. Proc.* 1714 (which he cited from the printed cases), and *The South Sea Company v. Wymondsell*, 3 P. Wms. 143a.

Lord MANSFIELD. The basis of the whole argument is fraud; and the question is, whether fraud is anywhere asserted in this replication. There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of *Sir Crisp Gascoyne*, who insured a life, and affirmed it was as good a life as any in England, not knowing whether it was or was not. There may be cases, too, which fraud will not take out of the statute of limitations. But, here, everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage-deed among the papers of his testator, without any arrears of interest, and parts with it, *bona fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did

not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it.

Hill had leave to amend, in case, upon inquiry, the facts would support a charge of fraud.

D'UTRICHT v. MELCHOR.

SUPREME COURT OF PENNSYLVANIA, 1789.

[1 *Dallas*, 428.]

THIS cause was tried at bar, in *September* term 1788, and, a verdict being found for the Plaintiff, the Defendant obtained a rule to shew cause why a new trial should not be granted; which was argued at the present term by *Coxe* and *Sergeant*, in support of the rule, and by *Lewis* and *Heatly* against it.

It appeared, that the Plaintiff had bought a tract of land from the Defendant, who had previously purchased it of one *Simpson*; but, as, upon enquiry, no land of the description contained in the Defendant's deed to the Plaintiff could be found, this action, which was an action of *Indebitatus Assumpsit* for money had and received to the Plaintiff's use, was brought, in order to recover back the consideration money that had been paid; and, on the trial, the Defendant's deed was given in evidence to prove the amount and acknowledgment of such payment. The declaration also contained a count in the nature of *deceit*; but, by agreement of the Council, it made no part of the argument, whether this could properly be coupled with the *Assumpsit*; so that the motion for a new trial was supported only upon these grounds:—1st, That the action of *Assumpsit* would not lie; and 2dly, That the deed ought to have been given in evidence upon the trial.

For the Defendant, it was contended, that, as there was no suggestion of fraud to vitiate and annul the original contract of the parties, the proper action was covenant on the words grant, bargain, &c. that if there was fraud, the remedy was an action of deceit; that *Assumpsit* would not lie; that if there was any deceit in the words of the deed, still the action might have been brought upon the deed itself; that a deed cannot be given in evidence to support an action of *Indebitatus Assumpsit*; that there was no proof of a parol *Assumpsit*; and that the Defendant could not plead a verdict in the present suit, in bar to another action of covenant upon the deed. See Com. Dig. 145. letter F. 1. Cowp. 414, 418, 818, 819; Doug. 132; 1 State

Laws, 79; 1 Salk. 210; Cro. J. 506; 1 Roll. Abr. 278; 1 Vin. Abr. 277; 2 Black. Rep. 1249; Gillb. L. E. 183; 12 Vin. 190.

For the Plaintiff, it was answered, that whenever natural justice implies that the party ought to refund, this action, which is like a bill in equity, will lie to compel him; that the deed was not the foundation of the action, but given in evidence merely to shew the amount of the consideration money, and the Defendant's acknowledgment of its being paid; and that the declaration was supported by the precedent in Doug. 18. See Salk. 22, 1 Lev. 102; Bull. N. P. 31; 2 Stra. 915; 1 Lord Raym. 742; 2 Burr. 1088; Salk. 284.

The case being held for some days under advisement, the CHIEF JUSTICE now delivered the opinion of the Court to the following effect:

M'KEAN, *Chief Justice*. It is unnecessary at this time to determine, whether the Plaintiff might have instituted an action of covenant, or deceit, in order to obtain a redress of the wrong which he has sustained; for, we think it is sufficient for his purpose, that an action of *Assumpsit* for money had and received to his use, has been brought; and that, to maintain this action, he may give in evidence, that the Defendant got his money by mistake, imposition, or deceit. To prove the alleged mistake, imposition, or deceit, deeds or other writings, which are not the immediate foundation of the suit, but only leading to it, may be read.

We are all, therefore, of opinion, that a new trial ought not to be granted.

Judgment for the Plaintiff.¹

LIVINGSTON, J., in *Weaver v. Bentley* (1803) 1 Caines, 46, 49, said: "The case of *D'Utrecht v. Melchor*, 1 Dall. 428, cannot be law."

"So, where the plaintiff paid money to the defendant, on the defendant's promise to make him a lease of land, and before the lease was made the defendant was evicted, the plaintiff recovered his money by this action [*assumpsit*] the consideration not having been performed. *Briggs' case*, Palm. a. 364."—1 *Espinasse* N. P. 2; but see *Brigg's case* as reported.

Wherever money is paid on a consideration which fails, it may be recovered. *French v. Millard* (1853) 2 Ohio St. 44; *Bonsteel v. Vanderbilt* (1855) 21 Barb. 26; *Smith v. McCluskey* (1866) 45 Barb. 610; 2 Greenleaf, Ev. 16th ed. § 124; and such failure is a good defence to a suit on the contract. *Gibson v. Pelkie* (1877) 37 Mich. 380; *Cockran v. Willis* (1865) L. R. 1 Ch. Ap. 58; and see as to equity cancelling such a contract, *Allen v. Hammond* (1837) 11 Pet. 63.

If plaintiff pays money under a contract permitting him to refuse to complete the contract, and he so refuses, he may recover the money advanced. *Johnson v. Evans* (1849) 8 Gill, 155, S. C. 50 Am. Dec. 669, with extensive note. And if payment is made to induce one to do something one is already legally bound to do, a recovery is allowed. *Parker v. Railroad Co.* (1844) 7 M. & G. 253.—Ed.

IN *Hill v. Rewee* (1846) 11 Met. 268, 271, SHAW, C. J., said: "The view which we took of the case was this: That the receipt of April 2d was manifestly an acknowledgment of a receipt of so much of the plaintiff's money, upon an executory contract to deliver a given quantity of hay at a fixed price. Then the rule is very well fixed that where money is paid on an executory contract to deliver goods, or transfer stock, or the like, in future, and the contracting party fails to perform, it is in the election of the other party to treat the contract as rescinded, to disaffirm it, and recover back his money, as money paid upon a consideration which has failed; or to affirm the contract, and recover damages for the non-performance. *Dutch v. Warren*, 1 Stra. 406, and more accurately stated by Lord MANSFIELD in 2 Burr. 1010 [*Moses v. Macferlan*]. If, therefore, the defendant had failed wholly in the performance of his contract to deliver the hay, the plaintiff might disaffirm the contract, and recover back the money advanced, as money paid on a consideration which had failed, and held by the plaintiff to the defendant's use. And in modern times, it has been held, that where the contract fails in part, if it be a precise and definite part, capable of being ascertained by computation, a corresponding part of the consideration may be recovered back, although the bargain or contract is in form entire. *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Parish v. Stare*, 14 Pick. 198; *Miner v. Bradley*, 22 Pick. 457.

"The contract being for the delivery of a quantity of hay at a fixed price, and all of one quality, the price per ton fixed the price per pound. If then a part of the hay was delivered, according to the contract, but a precise and definite part remained undelivered, and the defendant, without justification or excuse, refused to deliver the other part on demand, the court were of opinion, that a corresponding portion of the money advanced, capable of being ascertained by computation, might be recovered back."¹

¹"So, this action [money had and received] will lie when there has been a *partial failure* of consideration—or rather where *some part* of the consideration has *wholly failed*." Chitty, Contracts, 10th ed. 690.

See also *Huggins v. Coates* (1843) 5 Q. B. 432; *Devaux v. Conolly* (1849) 8 C. B. 640; *Scurfield v. Gowland* (1805) 6 East. 241; *Chawner v. Whaley* (1803) 3 East, 500.—Ed.

JONES AND OTHERS v. RYDE AND ANOTHER.

COMMON PLEAS, 1814.

[5 *Taunton*, 488.]

THIS was an action of assumpsit for money had and received which was tried at the sittings, in London, after Michaelmas term, 1813, before MANSFIELD, C. J., when a verdict was found for the plaintiffs, damages, £1000. subject to a case, which in substance was, that the defendants, who were bill brokers, were possessed of a navy-bill which purported to have been issued by the transport board, and to bear date and have been registered on the 17th of July, 1813. and to be payable on the 15th of October, 1813. and to be drawn on the treasurer of the navy in pursuance of a charter-party of 25th June, 1808, made with Messrs. Bell & Hobbs on behalf of the owners of the *Wolga*, Ward, master, hired to serve his majesty as a transport, for payment, ninety days after date, to Bell & Hobbs or their order, of £1875, and more to them, for interest thereon, from 7th July to 5th October following, when that bill would become due, being 90 days, at 3d. per cent *per diem*, £19 16s. 10d., together £1884 16s. 10d. . . .

On the 23d of August, the defendants discounted this bill with the plaintiffs, who were stock and bill brokers; they, calculating the interest upon £1883 16s. 3d., the apparent amount of the bill, for 53 days, from 23d August to 15th October inclusive, to be £13 13s. 6d., then paid the defendants £1870 2s. 9d. as the difference, and received from them the bill. On the 27th August the plaintiffs discounted the same bill with Williams, who calculated the interest upon the same apparent amount, for 49 days, from that day to the 15th of October, to be £12 12s. 10d. paid them £1871 3s. 5d. as the difference, and received from them the bill. The bill issued from the transport-office for £884 16s. 10d. only, but before the 23d of August some person had altered it by prefixing the figure 1 to the figures £884 16s. 10d., and £883 16s. 3d. in the several places where those sums occurred, and by prefixing the same figure 1 to each of the dates 7th July and 5th October, so that before and when it was discounted by the several above-mentioned parties, who were all unconscious of the alteration, it had thereby acquired, in the particulars altered, the appearance of a bill for the net sum of £1883 16s. 3d. dated 17th July and payable 15th October. On 5th October, Williams presented it at the Navy Pay Office for payment, which was refused on account of the alterations; upon the requisition of the commissioners, Williams deposited with them, without the knowledge of the

defendants, the altered bill; and in lieu of it accepted from them a new bill for the original amount. and received in discharge thereof £883 16s. 3d. after allowing £1 0s. 7d. for the property-tax charged on the interest. Williams thereupon demanded of the plaintiffs repayment of £1000, the difference between the sum he had received from the Navy Pay Office and the sum he had paid for the bill to the plaintiffs, which they repaid him, and brought the present action to recover from the defendants the like difference of £1000.

GIBBS, C. J. This is very distinguishable from the case of *Price v. Neal*, because there the bill was paid by the person who of all others was the best judge whether the acceptance was his handwriting or not, and he says, on looking at it, this is my handwriting and I pay it. The case of *Barber v. Gingell*, 3 Esp. 60. is a much stronger case even than that. It was an action on an acceptance written in the name of Gingell; the defendant had not accepted, nor ever acknowledged that he had accepted that bill; but it was proved that he had paid bills with similar acceptances, which in fact were forgeries of his son; and Lord KENYON, C. J., held that the defendant, having given credit to similar acceptances in the like course of dealing, was bound to pay the bill in question. The court are of opinion, that the plaintiff is entitled to recover the sum he seeks to recover by this action; and we think so on the ground on which it is put by my Brother LENS that this transaction is in the nature of an exchange between the two parties, made by the defendant upon the one hand, of a navy bill, professing to be a navy bill for £1884 16s. 10d., and the defendant representing it to be a genuine navy bill of that amount, and by the plaintiff on the other hand, of a sum of money equivalent to the sum which would be paid upon that bill when it should become due, supposing that it were a genuine navy bill, minus the interest for the time which it yet had to run. Both parties were mistaken in the view they had of this navy bill; the one in representing it be a navy bill of this description, the other in taking it to be such. Upon it afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. The ground of the defendant's resistance is, that the bill is not indorsed; and that whensoever instruments are transferred without indorsement, the negotiator professes not to be answerable for their validity. This question was much mooted in *Fenn v. Harrison*, 3 T. R. 757, and it is true to a certain extent, viz., that in the case of a bill, note, or other instrument of the like nature, which passes by indorsement, if he who negotiates it does not indorse it, he does not subject himself to that responsibility which the indorsement would bring on him, viz., to an action to be brought against him as indorser; but his declining to indorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he repre-

sents it. The defendant has in the present case put off this instrument as a navy bill of a certain description: it turns out not to be a navy bill of that amount, and therefore the money must be recovered back. *Bree v. Holbech* is very distinguishable. Common prudence required an administrator not to take on him more responsibility than his situation obliged him to incur, viz., to covenant that he had a good title notwithstanding any act done by himself; the covenant of an administrator ordinarily goes no further; and when an action is brought against him for money had and received, he says, you have all the security against me which a person in my situation ever gives, and that does not in the present case make me responsible. Compare this with the case of *Cripps v. Reade*, 6 T. R. 606, cited by my Brother HEATH. There was no deed: the whole rested in parol, and the whole was founded on the presumption that the title was such as it purported to be: it was not such as it purported to be, and therefore the purchase-money could not be retained. In the present case, the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice on which I should not rely as governing the law, but that it is said by my Brother LENS to be sanctioned on the authority of a case so decided at *nisi prius*, by MANSFIELD, C. J., namely, where forged bank notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be. Therefore the plaintiff must recover the difference.

HEATH, J. I am of the same opinion. If a person gives a forged bank note, there is nothing for the money: it is no payment. In the case of *Cripps v. Reade*, the defendant sold a term, supposing himself to be the personal representative of the deceased, without executing any assignment. *Bree v. Holbech* was cited upon the trial before LAWRENCE, J., and the rule *caveat emptor* was urged: the court refused a rule for a new trial. Lord KENYON, C. J., said that in *Bree v. Holbech* a regular conveyance was made, and no further covenants were to be added; but in the case of *Cripps v. Reade*, the whole had passed by parol, and the money had been paid under a mistake, and the action for money had and received would lie to recover it back.

CHAMBRE, J. I really cannot entertain a doubt on the question: if the defendant's doctrine could prevail, it would very materially impair the credit of these instruments. They are not in practice indorsed (or not beyond the first taker). A man takes this security, looking to the persons who are to pay it; he takes it on the presumption that it is a navy bill; it was once a navy bill, but from the moment wherein it was altered it became of no value whatsoever. It is unnecessary to go into the authorities. I agree it is incumbent on the plaintiff to show quite clearly that the payment of the £884 16s. 10d. was of the mere bounty and liability of government, but no further.

Everything that the plaintiffs have done, has been done for the good of the defendant. There is no doubt whatever that the judgment ought to be for the plaintiffs.

DALLAS, J. This is a case in which the parties are equally innocent, and have equal knowledge, and equal means of knowledge. I have no doubt whatsoever of the plaintiffs' right to recover. The case falls not only within the general principle that where a man has paid more than the thing is eventually worth, and the consideration fails, he may recover it back, but also comes within the express authority of *Cripps v. Reade*. Upon the ground therefore that the money was in part paid by mistake, upon a consideration that has failed, I am of opinion, that the plaintiffs are entitled to recover it back.

*Judgment for the plaintiffs.*¹

TARLING v. BAXTER.

KING'S BENCH, 1827.

[9 *Dowling & Rylands*, 272.]

ASSUMPSIT, for money paid by the plaintiff to the use of the defendant, with a count for money had and received, and the other common counts. Plea, non-assumpsit, with a notice of set-off for goods sold and delivered, and goods bargained and sold. At the trial before ABBOTT, C. J., at the *London* adjourned Sittings after *Hilary* Term, 1826, the plaintiff obtained a verdict for £145, subject to the opinion of this Court upon the following case:—

On the 4th of *January*, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff, was in these words:—"I have this day agreed to sell *James Tarling* a stack of hay, standing in *Canonbury Field, Islington*, at the sum of £145, the same to be paid

¹In *Ford and Warren v. Leatherer* (1817) 4 Bibb, 512, the plaintiffs sued to recover money which had been advanced in exchange for a bank note, which had been altered from five to fifty dollars. Judge LOGAN said: "There is no doubt that an action of assumpsit will lie to recover back money which had been advanced upon a fraudulent consideration, or the want of consideration."

So, where an army officer and others fraudulently sold tobacco, an action lay to recover money paid on the contract. *Wordward v. Fels* (1866) 1 Bush, 162; and so, also, where a town had paid money for one as a substitute, who was really a deserter. *Lebanon v. Heath* (1867) 47 N. H. 353.—ED.

on the 4th day of *February* next, and to be allowed to stand on the premises until the 1st day of *May* next." And the following note was signed by the plaintiff, and delivered to the defendant:—"I have this day agreed to buy of Mr. *John Barter* a stack of hay, standing in *Canonbury Field, Islington*, at the sum of £145, the same to be paid on the 4th day of *February* next, and to be allowed to stand on the premises until the 1st day of *May* next, the same hay not to be cut till paid for. *January* 4th, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, *S. Barter*, on the 8th of the same month of *January*, took a bill of exchange for £145 to the plaintiff, drawn upon him by the defendant, payable one month after date, which the plaintiff accepted. The defendant afterwards indorsed it to *George Barter*, and the plaintiff paid it to one *Taylor*, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of *January*, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant, to know what he meant to do when the bill became due. The defendant said, "I have paid it away, and you must take it up to be sure; I have nothing to do with it: why did you not remove the hay?" The plaintiff said, "I could not; there was a memorandum that it should not be removed until the bill was paid: would you have suffered it to be removed?" The defendant said, "Certainly not." The defendant's set-off was for the price of the hay, agreed to be sold as aforesaid. The question for the opinion of the Court was, whether the plaintiff, under the circumstances, was entitled to recover the sum of £145, or any part thereof.

BAYLEY, J.—There is no doubt about the principle of law which applies to this case; it is perfectly clear that the loss must be borne by the party in whom the property was vested at the time of its destruction by fire. The question, therefore, is, in whom was the property in this hay vested at that time? By the contract note delivered to the plaintiff, the defendant agreed to *sell* to the plaintiff a stack of hay, standing in *Canonbury Field*, for the sum of £145, the same to be paid for on the 4th day of *February* next, and to be allowed to stand on the premises until the 1st day of *May* next. That was a contract for an immediate sale; it was not prospective. Then in whom did the property by virtue of that contract vest? The right of property and the right of possession are distinct. The right of property may be in one person, and the right of possession in another. The vendor may have a lien upon the goods he has sold—a qualified right to retain possession of them until the price is paid—while the property in them may be in the vendee. If, therefore, it was the in-

tention of the parties in this case, that the vendee should by virtue of the contract immediately acquire a right of property in the hay, and the vendor a right of property in the price, the fact that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference. The settled rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that if the goods are lost or destroyed, the loss must be borne by the vendee. In this case the buyer's contract note imports an immediate, perfect, absolute agreement of sale, and I think the true construction of the contract is, that the parties intended an immediate sale; and if that is so, it follows that the property in the hay vested in the vendee, and that he must bear the loss. I am, therefore, of opinion, that the defendant is entitled to judgment of non-suit.

HOLROYD, J.—I am also of opinion that there was an immediate and not prospective sale of the hay in this case, though coupled with a stipulation on the part of the vendee, that he would not cut it until a future period. It is a rule in every case of a sale of goods, that if nothing remains to be done on the part of the seller, as between him and the buyer, before the goods are to be delivered, the property in the goods passes immediately to the buyer, and the property in the price to the seller; but that if anything remains to be done on the part of the seller, the property does not pass until that has been done. In this case, therefore, I am of opinion, not only that the property in the hay passed immediately to the buyer by virtue of the contract, but also that the seller thereby immediately acquired a property in the price agreed to be paid for the hay, although the payment was not to be made, or the hay to be cut, until a future period. Then the property in the hay having passed to the buyer, and the hay having been accidentally destroyed before the day of payment, the buyer must bear the loss.

LITTLEDALE, J.—There was an absolute agreement on the 4th of *January* for the sale and purchase of the hay, to be paid for in a month. According to the seller's contract note, the buyer might have cut and removed the hay immediately. By the buyer's contract note it was stipulated that he should not cut the hay until it was paid for. But the property in the hay had already passed to him by the first contract of sale, and all that he did afterwards was to waive his right to the immediate possession. Then the property having passed to the buyer, the loss must fall on him.

Judgment of nonsuit.

YOUNG v. COLE.

IN THE COMMON PLEAS, APRIL 29, 1837.

[3 *Bingham's New Cases*, 724.]

ACTION for money paid by the plaintiff to the use of the defendant, and for money had and received by the defendant to the use of the plaintiff.

The plaintiff, a stockbroker, was employed by the defendant in April, 1836, to sell for him four Guatemala bonds, of £254 each.

The plaintiff, in three or four days, sold them to Briant for £300, and deducting £1 5s. for his commission, paid the defendant £298 15s.

Briant, who was conversant with the usages of the Stock Exchange, kept the bonds two days, and then sold them again.

The bonds in question were not stamped. But,

In 1829 the Guatemala government had issued an order, which was advertised in the London newspapers, requiring the holders of such bonds to produce them, and have them stamped by an agent of that government within a certain time; in default of which they would not be recognized by the state. Evidence of the advertisement was offered and rejected; but it was proved that since that time, unstamped Guatemala bonds were not a marketable commodity on the Stock Exchange.

Upon that ground, Briant's vendee soon returned the bonds in question. Briant, representing the matter to the plaintiff, the plaintiff, without communicating with the defendant or returning the bonds, refunded what Briant had paid him, and now sought to recover the amount which he had himself paid over to the defendant.

The defendant, upon being applied to, wrote to say that he was agent only as to a part of the bonds; but that, if the payment had been made for his own part, he would desire his clerk to reimburse the plaintiff. At the trial he did not show that all the bonds were not his.

The plaintiff could find no one in this country who had authority now to stamp the bonds; but one witness said he had procured a stamp to bonds of the same description.

Both parties, at the time of the transaction, were ignorant that a stamp was necessary. It was proved that brokers on the Stock Exchange do business as principals, in dealing with foreign stock, and are liable to be expelled if they do not make good their differences. The defendant's name was not mentioned by the plaintiff to Briant.

On behalf of the defendant, it was objected at the trial before TINDAL, C. J., that under these circumstances the plaintiff could not recover on the declaration for money paid or money had and received; but should have declared specially on the implied warranty by the

defendant that the bonds he offered for sale were marketable bonds. Whereupon,

A verdict was taken for the plaintiff for the amount the defendant had received from him; with leave for the defendant to move to set the verdict aside and enter a nonsuit instead.

Sir *P. Pollock* accordingly moved the court to that effect, urging, that after Briant had kept the bonds for a length of time sufficient to enable him to decide whether he would make them his own or not, and had actually sold them to a third person, the plaintiff had no right to call on the defendant for a payment which the plaintiff was not compellable to make; at all events, not unless he had apprised the defendant of what he was about to do, and had returned the bonds so as to have afforded the defendant the opportunity of replacing them with stamped instruments. In *Street v. Blay*, 2 B. & Ad. 456, it was held, that a person who had purchased a horse warranted sound, sold it again, and then repurchased it, could not, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor could he by reason of the unsoundness, resist an action by such vendor for the price.

Wilde, Serjt., and *Ogle* showed cause.

F. Robinson in support of the rule.

TINDAL, C. J. It appears to me, that the sum for which the verdict has been given is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were salable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.

The remaining question is, whether the plaintiff had a right to rescind the contract he had entered into with Briant. It is to be observed that in that contract the defendant's name was never used; there was no contract between him and Briant: the plaintiff was the only person known to Briant. But stopping short of that, the universal custom of the Stock Exchange would authorize the plaintiff to rescind the contract without consulting the defendant; and the defendant has been in no respect damaged by what the plaintiff has done.

There is, however, another ground on which the verdict stands clear of objection; that is, that after the defendant was aware of all that

had been done, he wrote to say that if the bonds were his own, he would send his clerk to pay the plaintiff the amount. Having omitted at the trial to show that he held them in the capacity of agent, as he had asserted, his letter is a ratification of what the plaintiff had done, and the verdict ought not to be disturbed.

PARK, J., concurred.

BOSANQUET, J. I agree in the principle of the cases which have been cited as to breach of warranty, but this is not a case of that description. Here, no consideration has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. According to the principle established by *Child v. Morley*, the defendant was bound to reimburse the plaintiff what he was thus compelled to pay. For it appeared to be the custom of the Stock Exchange, that in these cases the broker is treated as principal, and liable to be expelled if he does not make good his differences. Upon either of the counts, therefore, the plaintiff may sustain this action. And even upon the defendant's letter, unless he showed the bonds not to have been his own, the plaintiff is entitled to retain the verdict.

COLTMAN, J. I am of the same opinion. The first question is, whether the plaintiff was entitled to rescind the contract with Briant; and I am of opinion he was. The bonds which he had sold at the defendant's request were not Guatemala bonds, in the sense of the Stock Exchange. Therefore, even considering the plaintiff only as agent, when he received authority from the defendant to sell the bonds he received an implied authority to act as all brokers do upon similar occasions; that is, to rescind the contract if the article delivered turns out not to be the article sold.

*Rule discharged.*¹

Frank v. Lanier (1883) 91 N. Y. 112.—DANFORTH, J. "Upon the pleadings, the questions were, whether certain written instruments purporting to be obligations of the United States, known as 'seventy-

¹In *Brewster v. Burnett* (1878) 125 Mass. 68, the plaintiff, having purchased counterfeit United States bonds, was permitted to recover the money paid for them; and see *Nicolay v. Unger* (1880) 80 N. Y. 54. And so as to money paid for counterfeit bills. *Young v. Adams* (1810) 6 Mass. 182; *Kent v. Bornstein* (1886) 12 Allen, 342; or on a bill of exchange materially altered after acceptance. *Master v. Miller* (1791) 4 T. R. 320.

Nor is a forged note considered payment, *Dinsdale v. Lanchester* (1803) 4 Esp. 201; *Markle v. Hatfield* (1807) 2 Johns. 453; nor a dishonored draft, *Puckford v. Maxwell* (1794) 6 T. R. 52.

Money paid on a forged endorsement may be recovered from an innocent holder. *Carpenter v. National Bank* (1877) 123 Mass. 66.—Ed.

thirty' notes, numbered respectively 16074, 160436, 68573, 140133, were in fact sold by the defendants to the plaintiffs, and if so, were they forgeries? At the trial evidence was given by the plaintiffs upon these points, but the defendants controverted none of it, and we agree with the two courts by whom the facts in issue have been examined, that the testimony established the identity of the notes as those sold by the defendants, and it being unanswered, that there was no question upon which the opinion of the jury was necessary. The appellants, however, claim that the plaintiffs were negligent in not sooner detecting the forgery, and also in failing to return the notes. No authority is cited to the effect that one who sells as genuine, a forged note, can avoid his liability to refund because of delay by his vendee in detecting the forgery, or in giving notice of it. The duty of the vendee to make such examination, cannot be greater than was the duty of the vendor to make it, before he parted with the paper and received its price, nor will the mere lapse of time confirm his title to the purchase money if the purchaser exercised reasonable diligence in giving notice after the forgery was ascertained. *Weiser v. Denison*. 10 N. Y. 68; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Kingston Bank v. Ettinge*, 40 N. Y. 391; *Weiser v. Hatch*, 86 N. Y. 614, opinion by FOLGER, J."¹

THOMPSON v. GOULD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1838.

[20 *Pickering*, 134.]

INDEBITATUS assumpsit to recover back from the defendant, the sums of money mentioned in the receipts hereafter set forth. The parties stated a case.

About the 8th of May, 1835, the defendant offered to sell the estate to the plaintiff for 3700 dollars, and the plaintiff agreed to take it at that price. The defendant undertook to procure a discharge of the mortgage, it being a part of the agreement that the plaintiff should have the estate free from incumbrance. The plaintiff requested the defendant to make certain repairs on the house, and agreed to pay for them. These agreements were parol. Between the 8th of May and the time of the fire on the 18th, the plaintiff carried into the house articles of furniture, and all the things which he intended to place in the house. During the same period he was frequently at the house superintending and directing the repairs. On the 14th of May the

¹See *Rick v. Kelly* (1858) 30 Pa. St. 527; *Schroeder v. Harvey* (1874) 75 Ill. 638.—Ed.

plaintiff paid the defendant 2000 dollars, and took a receipt as follows: "Boston, May 14, 1835. Received of Samuel Thompson sixteen hundred dollars in part pay for estate sold him by me, in Salem street. Do. four hundred. Thomas Gould." On the 16th of May the defendant told the plaintiff that he could not get the mortgage discharged, and asked the plaintiff what he should do. The plaintiff replied, that he would pay him the rest of the money, if he wished it, but he must get the mortgage discharged the best way he could. On the same day the plaintiff paid the defendant 1848 dollars and took a receipt as follows: "Boston May 16, 1835. Received of Samuel Thompson eighteen hundred and forty-eight dollars. Thomas Gould." The payments by the plaintiff exceeded the price of the estate and the cost of repairs by the sum of \$82.33. Between 10 and 12 o'clock on the 18th of May the defendant paid the mortgage and received the mortgage deed and policy of insurance, with an indorsement on the policy as follows: "May 18, 1835. Value received, the M. H. Life Ins. Co. hereby release all their claim on this policy. N. Bowditch, Actuary;" and before 2 o'clock of the same day the actuary discharged the mortgage on the record. The policy was not assignable except with the assent of the assurers, and no application for their assent was made.

If in the opinion of the court the plaintiff was entitled to recover the whole or any part of his demands, the defendant was to be defaulted; if not, the plaintiff was to be nonsuited.

WILDE, J., delivered the opinion of the Court. This is an action of assumpsit, in which the plaintiff claims a certain sum of money paid by him to the defendant on a consideration which has failed. The money was paid on a parol agreement to purchase of the defendant a certain house and estate, which were to be conveyed to the plaintiff free and clear of all incumbrances, the defendant undertaking to discharge a mortgage on the estate, which was subsequently done, but before the estate was conveyed to the plaintiff the house was consumed by fire and the material question is, which of the parties shall eventually sustain this loss.

A previous question is interposed, arising from an objection to the form of the action, which, although it does not affect the merits of the case, is nevertheless sufficient, if well founded, to defeat the present action. It is contended by the defendant's counsel, that the money was paid on an executory contract still subsisting, and that the plaintiff's remedy, if he has any, is by an action on the contract, or by a bill in equity.

It cannot be denied, that if the money demanded were paid on a valid subsisting contract, the plaintiff's remedy for the non-performance by the defendant, would be by an action on the contract, and that a general indebitatus assumpsit to recover the purchase money could not be maintained. But it is very clear that the parol contract in

the present case is void by the statute of frauds, and that a part performance of the agreement, by payment of the purchase money, does not take the case out of the statute. In the case of *Davenport v. Mason*, 15 Mass. R. 94, it was said that the statute does not wholly vacate the contract, but only inhibits all actions brought to enforce it, and that the doctrine of courts of equity as to the effect of part performance of a parol agreement for the conveyance of real estate, seemed to have been recognised by the courts of law; and the case of *Crosby v. Wadsworth*, 6 East, 602, was referred to as a case turning upon this principle. But the case of *Davenport v. Mason* was decided on a different point. And no case can be found, where in an action on the contract it has been decided, that part performance of a parol agreement for the conveyance of land would take a case out of the statute. On the contrary, it was decided in the case of *Kidder v. Hunt*, 1 Pick. 328, that no action would lie on such a contract, and that part performance would not take it out of the statute.

It has been argued that this contract may be enforced in equity. But if it might be, that would not affect the plaintiff's legal rights. This Court, however, has no authority to decree a specific performance of a parol contract. Nor could this contract be enforced by a Court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages. 1 Sudg. Vend. (9th edit.) 304; *Hepburn v. Auld*, 5 Cranch, 262; *Waters v. Travis*, 9 Johns. R. 464.

The only question, therefore, is, whether the plaintiff or the defendant is to sustain the loss by fire. In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly clear, and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction. *Tarling v. Baxter*, 9 Dowl. & Ryl. 276; *Hinde v. Whitehouse*, 7 East, 558; *Rugg v. Minett*, 11 East, 210. No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends on the nature and quality of the property, and there can therefore be no distinction between personal and real estate. And so it is laid down by Chancellor KENT, in his Commentaries. "Thus if A sells his horse to B, and it turns out that the horse was dead at the time, though the fact was unknown to the

parties, the contract is necessarily void. So if A, at New York, sells to B his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house, and not the ground on which it stood, was the essential inducement to the purchase." 2 Kent's Comm. (2d edit.) 367.

The same principle applies to an agreement to purchase a house, as in the present case, the house being casually destroyed before the purchase is completed. Neither party being in fault, the loss must be borne by the owner of the property.

A different doctrine has been adopted in equity, founded on the fiction, that whatever is agreed to be done, shall be considered as actually done. So that if there is an agreement to purchase, it is equivalent to an actual purchase, in contemplation of equity; and the purchaser must bear any loss which may happen to the estate between the agreement and the conveyance. In *Paine v. Meller*, 6 Ves. 349, where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee. Upon this decision Sugden remarks, that it proceeded on the only principle upon which it could be supported, that the purchaser was in equity the owner of the estate. Sugd. Vend. (9th edit.) 278. And in *Ex parte Minor*, 11 Ves. 559, where a similar accident happened to an estate sold before a master, and the report had only been confirmed nisi, the loss was holden to fall on the vendor.

Formerly, however, a different doctrine was admitted in courts of equity. In *Stent v. Baylis*, 2 P. Wms. 220, the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same, the house burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again." So upon a sale of a leasehold for lives, and previously to the conveyance one of the lives dropped, although a specific performance was decreed, the Lord Keeper intimated, that if all the lives had been dropped before the conveyance the decision might be different, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance. Thus it appears, that formerly the principle was the same in equity as it ever has been in law. And in one respect the principle still remains the same, namely, that the loss of the property under similar circumstances as those in the present case, must be borne by the owner of the property at the time the loss happened; and it seems impossible that any different principle can be adopted. As we therefore cannot recognise the fiction in equity, by which a purchase and an agreement to purchase are held to be similar, and

indeed indetical in respect to the present question, we must hold that the defendant is bound to repay the purchase money, as the consideration upon which it was paid has wholly failed, the plaintiff not being bound, under the circumstances of the case, to accept a deed of the land. Where the contract is entire, the vendor cannot recover or retain part of the purchase money, where he cannot convey or make a good title to the whole estate sold.

The rule in chancery on this point also, is somewhat different and depends more on the discretion of the court; which has given rise to many conflicting opinions and decisions.

In the case of the Cambridge wharf, upon which Lord KENYON, when sitting in chancery, in the case of *Poole v. Shergold*, 1 Cox's Rep. 273, made some remarks, the vendor made title to all the estate but the wharf, and that part of the land was the principal object of the vendee in making the purchase, yet the purchaser, who had contracted for the house and wharf, was compelled to complete the purchase. This decision, as Lord KENYON truly remarked, was contrary to all justice and reason. In other cases a more reasonable doctrine has prevailed, which is, "that if there be a failure of title to part, and that appears to be so essential to the residue, that it cannot reasonably be supposed the purchase would have been made without it, or as in the case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*." This rule was adopted in Pennsylvania, in the case of *Stoddart v. Smith*, 5 Binney, 355, and a similar rule has been adopted in South Carolina. *Pringle v. Executors of Witten*, 1 Bay, 256; *Tunno v. Fludd*, 1 McCord, 121.

"The good sense and equity of the law on this subject is," as Chancellor KENT remarks, "that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. But if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price." 2 Kent's Comm. (2d edit.) 373.

This rule, if applied to the present case, would not alter the result. But it is not necessary to consider the case in reference to this rule, however reasonable it may be, as the plaintiff cannot be compelled to perform the contract; and as no fault can be imputed to him, he is entitled to recover back the purchase money. If the house had not been destroyed, and the plaintiff had refused to perform the contract, the case would have required a different decision.

*Judgment for plaintiff.*¹

¹If the contract had been for the sale of a house, then destruction of the

ROBINSON v. BRIGHT'S EXECUTOR.

COURT OF APPEALS OF KENTUCKY, 1860.

[3 *Metcalf*, 30.]JUDGE WOOD delivered the opinion of the court.¹

In *Griswold, &c. v. Taylor's adm'r*, 1 Met. 230, it was decided, that where the consideration of a contract appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity; or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it, the consideration wholly fails, there a promise, resting on this consideration, is no longer obligatory. And, accordingly, in the case of a contract for the sale and purchase of a slave, where it is made to appear that before and at the time of such sale the slave was unsound and diseased, and of no value, and that he afterwards died of such disease and unsoundness, there can be no recovery, by the seller, of the price stipulated to be paid for the slave, because of the total failure of the consideration.

It is said, however, that, in all such cases, there must be a total failure of the consideration; for, if there be a consideration left, however much impaired or diminished, it will be sufficient to sustain the contract.

In *Parsons on Contracts*, sec. 14, page 385, it is laid down that "where the consideration appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity, . . . the party paying or depositing money upon it can recover it back."

The case now before the court differs from that of *Griswold, &c. v. Taylor's adm'r*, in this respect only, that *here* the money has been actually paid for the slave, now alleged to have been of no value at the time of the sale, and hence a total failure of the consideration upon

house would have destroyed the subject matter of the sale. If, however, the sale were of the land upon which the house stood, the house would pass with the land as part thereof, and there would be no failure of subject matter, inasmuch as purchaser got what he bargained for, namely, the land in question. Upon whom shall the loss fall? The principal case says on the vendor; many cases hold upon the vendee, who is regarded as the equitable owner from the time of the contract. The authorities are about equally divided, with a slight preponderance in favor of the "equitable" view.

On this controversy, see the following articles, which practically exhaust the subject: Samuel Williston on The Risk of Loss after an Executory Contract of Sale in the Civil and Common Law, 9 Harv. L. R. 92, 79; 106-130; Judge KEENER on The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract, 1 Columbia L. R. 1-10.—Ed.

¹A part of the opinion only is given.—Ed.

which the money was paid, whereas in *Griswold v. Taylor* the action was upon the promise to pay the money, the consideration for the promise having totally failed, as was alleged. In the latter case it was decided that there could be no recovery upon the promise.

Now the question is presented, can money, which has been paid for a chattel of *no value* when sold, and where there is thus a total failure of the consideration upon which the payment was made, be recovered back?

We are unable to perceive any difference in principle between the two cases. If it is unjust and unconscientious in the one to coerce the payment of the money, in the other case it is equally against justice and good conscience to retain the money. In either case the party is compelled to part with his money without having received any value whatever for it.

And there is ample authority for the recovery back, by an independent action, of money paid upon a consideration believed at the time of the contract and payment to be valuable, *but which was in fact, at the time, of no value whatever.*

In *Spring v. Coffin*, 10 Mass. 32-35, it was decided that a party who had paid money upon a bargain by which nothing passed to him, had his remedy for the money, "as paid for a consideration which has failed." In *Woodward v. Cowing*, 13 Mass. 216, it was said by the court, "where money has been paid upon a consideration which has failed, it may certainly be recovered back by the party who shall have paid it." *Neel v. Deens & Smith*, 1 Nott & McCord, 210; *Wharton v. O'Hara*, 2 Nott & McCord, 65.

In *Murray & Co. v. Carrett & Co.*, 3 Call, 373, the same principle was approved by the court of appeals of Virginia.

In *Moses v. McFerlan*, 2 Burrows, p. 1012, it was held (opinion by Lord MANSFIELD), that an action could be maintained for money paid upon a consideration which happened to fail, and the defendant ought, *ex aequo et bono*, to refund.

The same doctrine is recognized by the supreme court of Massachusetts in the case of *Harrington v. Stratton*, 22 Pickering, 510, although that was an action by the payee against the maker of a promissory note. See *Colville v. Besley and others*, 2 Denio, 139; 5 Humphreys, 496; *Charlton v. Lay*, opinion by Judge GREEN.

In the case now before us it was alleged that the negro, at the date of the sale, was unsound and of *no value*, and that there was consequently a *total* failure of the consideration upon which the purchase money had been paid. The petition stated facts sufficient to constitute a cause of action, and which, if found to be true, would have warranted a recovery by the plaintiff.

The demurrer ought therefore to have been overruled.

But to enable the appellant to succeed upon the ground we have been considering, he must show a total failure of the consideration.

For the error in sustaining the demurrer the judgment of the circuit court *is reversed*, and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with the principles of this opinion.¹

(2) *Mistake may be as to the Title of the Vendor.*

DALE'S CASE.

COMMON PLEAS, 1585.

[*Cro. Eliz.* 44.]

DECEIT.² For that the defendant sold to the plaintiff certain goods as his own goods, *ubi revera* they were the goods of a stranger.

"Where a material mistake occurs in respect to the *nature* of the subject-matter of a sale, there is no mutual assent, and, therefore, the contract is void. Thus, if an article be bought as being one thing, when it is, in fact, a different thing, the sale is voidable. *Conner v. Henderson*, 15 Mass. 319. (Judge STORY adds in a note: 'This class of cases is usually treated as coming within the purview of Implied Warranty; but if they can be fairly considered to come under such a head, they are also governed by the simpler rules relating to mistake, or fraud, which would afford a surer remedy to the person injured. An Implied Warranty would seem only to relate to the quality or title of an article, and not to its nature.') As, where an article was bought as 'waste silk,' which could not fairly be sold by such a name, *Gardner v. Gray*, 4 Camp. 144; *Meyer v. Everth*, *id.* 22; or where a certain material was brought as 'scarlet cuttings,' which was not really 'scarlet cuttings,' *Bridge v. Waine*, 1 Stark N. P. C. 504; see also *Shepherd v. Kain*, 5 Barn. & Ald. 240; or where a stone was sold as a bezoar stone, when it was not such a stone, *Chandeler v. Lupus*, *Cro. Jac.* 4; or, where a bag containing pieces of leather and burnt clay and bones were sold as a 'seroon of indigo'; the sale was merely void. *Williams v. Spafford*, 8 Pick. 250."—STORY, *Sales*, § 148. For the doctrines applied in such cases, with elaborate citations, see Benjamin, *Sales*, 7th ed. Chapter on "Warranty."

In *Chapman v. Speller* (1850) 14 Q. B. 621, 624, PATTESON, for the court, said: "In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid."—ED.

²In *Stuart v. Wilkins* (1778) Douglas 18, Lord MANFIELD, ASHURST and BULLER, Justices, agreeing, held, after some hesitation, that assumpsit was the proper action where there had been an express warranty, and remarked: "Selling for a sound price without warranty may be a ground for an assumpsit, but in such a case, it ought to be laid that the defendant knew of the unsoundness."

"All the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit." Per GROSE, J., in *Pasley v. Freeman* (1789) 3 T. R. 51, 54.—ED.

It was alleged that the action did not lie, because it was not alleged that the defendant *sciens* that they were the goods of a stranger. And for that reason PERIAM and WYNDHAM held the action did not lie, but if it had been so alleged, the action did lie; for it may be, the defendant did know no otherwise but that they were his own goods, then the action would lie.

ANDERSON, *contra*, for it shall be intended, that he that sold had knowledge whether they were his goods or not. 42 Ass. 8. And it was afterwards adjudged against the plaintiff.

HARDING v. FREEMAN.

UPPER BENCH, 1651.

[*Style*, 310.]

HARDING brought an action upon the Case against Freeman, and declared against him, that the Defendant did sell unto him a Gelding, and upon the sale did falsely affirm unto him, that the Gelding was his own Gelding, and that he bred him of a Colt, whereas he bred him not of a Colt, neither was it his own Gelding, but another man's Gelding, and so concludes to his damage. Upon not guilty pleaded, and a Verdict found for the Plaintiff, the Defendant moved in Arrest of Judgment, 1. That in this sale of the Gelding, the Defendant had made no warranty of him; and therefore though the sale were not good, yet the Action lies not. 2ly. The Plaintiff doth not declare that the Defendant knowing the Gelding to be another man's, did affirm him to be his own, and so here doth not appear to be any fraud in the sale. TWIDEN answered, that the words are sufficient to imply a deceit, though they express not, that he knowing it to be another man's horse did make the affirmation, for the words are that he did it *falso et fraudulenter*, and affirmed the Horse to be his own. But the Court stayed the Judgment, for they said, that here is no direct affirmation, but only an intendment that *scienter fecit*. Yet afterwards judgment was given for the Plaintiff.

CROSSE v. GARDNER.

KING'S BENCH, 1689.

[*Comberbach*, 142.¹]

CASE. The Plaintiff declares, that the Defendant having discourse of two Oxen did affirm them to his own proper Oxen, to which the Plaintiff *sidem adhibens*, gave him so much for them, *ubi revera* they were the Oxen of J. S. &c.

It was agreed by the Attorney-General last Trinity-Term, that the Action did not lie on a bare Affirmation without a Warranty. 2 Cro. 4; 11 Ed. 4, 6; 1 Roll. 96, 97; 1 Roll. Rep. 276 in Point; and he said further, that it was not lain to be deceptive.

GOLD, *contra*. As to the Case in 2 Cro. 4. The Reason of that is, because 'tis in his Trade, as to 11 Ed. 4, 6, that is on an Affirmance, that such a Thing was of such weight or Measure, and it was the Plaintiff's Fault that he did not Weigh or Measure it; but in our Case it is an offer to sell, and is a Possession, and without Doubt, if it had been laid *Sciens*, it had been actionable, but as it is here, it is *Damnum & deceptio*. Ass. pl. 8; 2 Cro. 197, the Difference, where the Party hath the Goods in his Possession, which he affirms to be his own.

That the Affirmance induceth the Buying, and the Eviction by the rightful Owner is the Damage. 2 Cro. 474, 196, 197; Mo. 126. 1 Roll. 96.

Attorney-General. Admitted, if an Affirmation with an Intent to deceive had been laid, the Action had lain, but it is not so here. 2 Cro. 474.

HOLT, Ch. J. Affirmation to support the Action ought to be at the Time of the Sale, and there it is an Inducement to buy, and the Difference taken is good, where the Plaintiff may as well satisfy himself as the Defendant; and where it lieth only in the Conusance of the Defendant, who affirms. Yelv. 20. *Sciens* is supply'd by the Verdict.

DOLBEN, inclined, that the Action lay, and that there was such a Case in this Court seven Years ago.

Afterwards, in this Term the Case was argued again, and *per Cur'*, the Action well lieth. 3 Cro 44; Jones, 196; 1 Roll. 91. *Sciens* omitted, and yet the Action lies. 1 Sid. 146.

HOLT. That Credit given on the Affirmation makes the Action lie.

EYRES agreed on the Case. Jones, 196.

Judgment *pro Quer'*.

MORLEY v. ATTENBOROUGH.

EXCHEQUER, 1849.

[3 *Exchequer Reports*, 500.]

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a harp for £15 15s., the defendant promised that he had lawful right and title to sell it to the plaintiff, that the plaintiff bought the harp and paid for the same. Breach, that the defendant had not lawful right or title to sell the harp. There was also a count for money had and received to the plaintiff's use. Plea, *non assumpsit*.

At the trial, before PLATT, B., at the Middlesex sittings after Easter term, 1847, the following facts appeared:—In the year 1839, a person of the name of Poley, having hired a harp of Messrs. Chappell, music-sellers, pledged it with the defendant, a pawnbroker, for £15 15s., on the terms that, if the sum advanced were not repaid within six months, the defendant should be at liberty to sell it. The defendant had no knowledge that the harp did not belong to the party pledging it. The harp not having been redeemed at the stipulated time, the defendant, in the year 1845, sent it with other articles to be sold by public auction. The auctioneers were accustomed to have quarterly sales of unredeemed pledges, of which the present sale was one, and on those occasions were in the habit of putting other lots into the sale. The sale extended over several days, and a general catalogue, comprising the articles to be sold on each day, stated on the titlepage, that the goods for sale consisted of “a collection of forfeited property, reserved, agreeably to Act of Parliament, for quarterly sale (see 39 & 40 Geo. 3, c. 99, § 18), pledged prior to May, 1844,” with certain pawnbrokers (naming them, and amongst others the defendant), and that the lots without numbers were “other effects.” Catalogues were also printed, applicable to each day’s sale. The harp, which was numbered in the catalogue, was knocked down to the plaintiff for £15 15s., but no warranty of title was given. The Messrs. Chappell, having afterwards discovered that the harp was in the plaintiff’s possession, commenced an action against him for its recovery, whereupon the plaintiff gave up the harp to them, and paid the costs, for which, together with the price of the harp, the present action was brought. On behalf of the defendant it was objected, that there was no warranty of title, either express or implied, and that the plaintiff ought to be nonsuited. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.¹

The judgment of the Court was now delivered by

PARKE, B. This case was argued some time ago before my Lord Chief Baron, my Brothers ROLFE, PLATT, and myself, and stood over for our consideration. The plaintiff brought an action of assumpsit, stating, that in consideration that the plaintiff would buy a harp for a certain sum, the defendant promised that he, the defendant, had lawful right to sell it, and the breach assigned was that he had not.

It appeared on the trial before my Brother PLATT, that the defendant, who was a pawnbroker, had the harp pledged with him in the way of his business, and, the time having elapsed for its redemption, and the pledge being unredeemed, offered it for sale through certain auctioneers, who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up, after it had

¹The learned arguments of counsel are omitted.—ED.

been delivered to him by the defendant. But, of the want of title of the pawner to it the defendant was ignorant, and there was no express warranty. My Brother PLATT directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit.

On showing cause, the case was fully argued, and every authority cited and commented upon on both sides, bearing on the question, whether there is an implied warranty of title in the contract of sale of an article, or under what circumstances there is a liability on the part of the vendor to make good a loss by defect of title.

It is very remarkable that there should be any doubt, as that, certainly, is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specific chattel, by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. With respect to *executory* contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed. But when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? According to the Roman law (*Vide* Domat, Book 1, tit. 2, § 2, art. 3), and in France (Code Civil, c. 4, § 1, art. 1603), and Scotland, and partially in America (1 Johns. Rep. 274; Broom's Maxims. 628, where this subject is well discussed), there is always an implied contract that the vendor has the right to dispose of the subject which he sells (Bell on Sale, 94); but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the pur-

chaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102a; 3 Rep. 22a; Noy, Max. 42; Fitz. Nat. Brev. 94c, in *Springwell v. Allen*, Aleyn, 91, cited by LITTLEDALE, J., in *Early v. Garrett*, 9 B. & C. 932, and in *Williamson v. Allison*, 2 East, 449, referred to in the argument. The same principle applies to transfer by deed. Lord HALE says, "Though the words 'assign, set over, and transfer,' do not amount to a covenant against an eigne title, yet, as against the covenantor himself, it will amount to a covenant against all claiming under him." (*Deering v. Farrington*, 3 Keb. 304, which was an assignment of a *chose in action*.)

It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22a); and Mr. Justice BLACKSTONE says, "In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;" and Mr. Wooddeson, in his Lectures (Vol. 2, p. 415), goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

At all times, however, the vendor was liable if there was a warranty *in fact*; and at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord HOLT, in *Medina v. Stoughton*, 1 Salk. 210; Ld. Raym. 593, says, that "where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;" and Mr. Justice BULLER, in *Pasley v. Freeman*, 3 T. R. 57, disclaims any distinction between the affect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases.

Some of the text writers drop the expression of "warranty" or "affirmation," and lay down in general terms, that if a man sells goods *as his own*, and the title is deficient, he is liable to make good the loss (2 Black. Com. 451); the commentator cites, for that position, Cro. Jas. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor *affirmed* that he had a title, and therefore it would seem that the learned author treated the expression, "selling as his own," as equivalent to an affirmation or warranty. So Chancellor KENT, in 2 Com. 478, says, "that in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his

peril; but if the seller has possession of the article, *and he sells it at his own*, and for a fair price, he is understood to warrant the title." From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice TINDALE, in *Ormrod v. Huth*, 14 M. & W. 664, it would seem that there is no applied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to.

Similar questions occur in cases as to the quality of goods, in which it is clear there is, by law, no implied warranty; yet, if goods are ordered of a tradesman, in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on a *sale of a forfeited pledge eo nomine*. Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law (see 1 Jac. 1, c. 21), he gains no better title by a pledge than the pawnner had; and as the rule of the common law is, that there is no

implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the judge at the trial was not drawn to this count, nor was it noticed on the argument in court.

It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidate damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstance must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is, whether there is an implied warranty.

*Rule absolute.*¹

EICHHOLZ v. BANNISTER.

COMMON PLEAS, 1864.

[17 *Common Bench Reports, New Series*, 708.]

THIS was an action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated; Claim, £19. Plea, never indebted, whereupon issue was joined.

The cause was tried in the court of record for the trial of civil actions within the city of Manchester, before the deputy recorder, when the facts which appeared in evidence were as follows:—The plaintiff was a commission-agent at Manchester. The defendant was a job-warehouseman in the same place. On the 18th of April last, the plaintiff went to the defendant's warehouse, and there saw, among other goods which the defendant had just purchased, 17 pieces of prints, which he offered to buy of him at 5½d. a yard. After some discussion, the defendant agreed to sell them, and gave the plaintiff

¹See *Chapman v. Speller* (1850) 14 Q. B. 621.—Ed.

an invoice in the following form, the whole of which was printed, with exception of the parts in italics:—

21 CHORLTON STREET, PORTLAND STREET,
MANCHESTER. April 18th, 1864.

Mr. Eichholz

Bought of R. Bannister, Job-warehouseman
Prints, Fents, Grey Fustians, &c. Job and perfect Yarns in Hanks,
Cops, and Bundles.

17 <i>pieces of prints</i> , 52 yds. at 5¼d.	£19	0	0
1½ <i>per cent for cash</i>		6	0
	£18	14	0

The plaintiff paid for the goods before he left the warehouse, and the defendant sent them by a porter to the plaintiff's place of business. The plaintiff sold the lot a few days afterwards for £19 15s. net. The goods were subsequently returned to the plaintiff, they having been recognized as goods which had been stolen from the premises of one Krauss. The goods were taken possession of by the police, and the thief, one Aspinwall, was tried at the general quarter sessions of the peace holden in and for the City of Manchester on the 9th of May last, and convicted, and sentenced to penal servitude for four years.

On the part of the defendant, it was objected that there was no case to go to the jury, inasmuch as there is no implied warranty of title on the sale of goods.

For the plaintiff it was insisted that he was entitled to recover, the money having been paid upon a consideration which had wholly failed.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover.¹

ERLE, C. J. I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided; and a rule has been obtained on behalf of the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere

¹In the arguments of counsel in this case, and in *Morley v. Attenborough*, *ante*, will be found collected the greater number of the important earlier English cases on the subject.—Ed.

contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule *caveat emptor* applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at, is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities, that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of PARKE, B., in *Morley v. Attenborough*, 3 Ex. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition. See *Bannerman v. White*, 10 C. B. N. S. 844. But that is foreign to the present inquiry. In *Morley v. Attenborough*, 3 Ex. 513, PARKE, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shopkeeper, in words or by his conduct, affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. *Holker*, which he answered by assertion after assertion, coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from *Noy* certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this,—I am in possession of a horse or other chattel; I neither affirm nor deny that I am the owner; if you choose to take it as it is, without more, *caveat emptor*; you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to be the principle on which *Morley v. Attenborough* was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says,—I have under the provisions of the statute (39 & 40 G. 3, c. 99, § 17) a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a *fi. fa.* *Chapman v. Speller*, 14 Q. B. 621. The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many

contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is, that I understand the decision of this court in *Hall v. Conder*, 2 C. B. N. S. 22. There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject of the contract there, was not matter, it was rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money.¹ Such a case falls within the doctrine stated by Blackstone, and is so recognized by LITTLEDALE, J., in *Early v. Garrett*, 9 B. & C. 928; 4 M. & R. 687, and by PARKE, B., in *Morley v. Attenborough*, 3 Ex. 513. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord COKE consists of mere *dicta*. These *dicta*, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother WILLIAMS, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to show the wisdom of Lord CAMPBELL's remark in *Sims v. Marryat*, 17 Q. B. 291, that the rule is beset with so many exceptions that they well nigh eat it up. It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.

BYLES, J. I also am of opinion that this rule should be discharged. It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly, as my Lord has observed, barren ground; not a single judgment has been given upon it. In every case, there has been, subject to one single exception, either declaration or conduct. Chancellor Kent, 2 Com. 478, says: "In every sale of a chattel, if the possession be at the time in

¹There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty that the vendor is the owner and has a right to sell." SPENCER, C. J., *Vibbard v. Johnson* (1821) 19 Johns. 77, 79.—Ed.

another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril;" for which he cites the *dicta* of Lord HOLT in *Medina v. Stoughton*, 1 Salk. 210; 1 Ld. Raym. 523, and of BULLER, J., in *Pasley v. Freeman*, 3 T. R. 57, 58. "But," he goes on, "if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think Lord CAMPBELL was right when he observed that the exceptions had well nigh eaten up the rule.

KEATING, J. I am of the same opinion. Whether it be an exception to the rule or a part of the general rule, I think we do not controvert any decided case or *dictum* when we assert, that, under circumstances like those of the present case, the seller of goods warrants that he has title. These goods were bought in the defendant's shop in the ordinary course of business. He gives an invoice with them, which represents that he is selling them as vendor in the ordinary course. I think the case falls within that put by PARKE, B., in *Morley v. Attenborough*, of a sale in a shop, which he treats as a circumstance which beyond all doubt gives rise to a warranty of ownership. I was somewhat pressed by Mr. *Holker's* question whether there is more affirmance of title in the case of a sale in a shop than in a sale elsewhere. It may be that the distinction is very fine in certain cases. If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now. Here, the sale took place in a public shop, in the ordinary way of business, and every circumstance concurs to bring the case within the distinction put by PARKE, B., in *Morley v. Attenborough*.

*Rule discharged.*¹

ROSWEL v. VAUGHAN.

EXCHEQUER, 1607.

[*Croke's James*, 196.]

ACTION on the case in the nature of deceit. Whereas on the ninth of June, 35. Eliz., queen *Elizabeth* was seised in fee of the advowson of the vicarage of *Southstoke*, whereto the tithes in *Southstoke* appertained; to which vicarage the defendant, on the ninth of June, 35 Eliz. affirmed that he was lawful incumbent, and had right to the

¹In *Ryall v. Rowles* (1749-50) 1 Ves. Sr. 348, 351, LEE, Chief Justice, com-

tithes from the death of *Thomas Vaughan* the incumbent; whereupon the plaintiff, 16th *June*, 35 Eliz. having communication with the defendant about his buying of the defendant the tithes appertaining to the said vicarage, after the death of the said *Thomas Vaughan* (who died 16th *April*, 35 Eliz.) until *Michaelmas* following; that the defendant, *ad lunc sciens* that he had not any right or interest to the tithes, whereas he never was instituted and inducted, but that they appertained to *Evan Thomas*, sold them to the plaintiff for thirty pounds, *fals o et deceptivè*; and alledgedth *in facto*, that *Evan Thomas* was presented, admitted, instituted and inducted to that vicarage on the last day of *August*, 35 Eliz. and took the tithes, and so the plaintiff lost them.

The defendant pleads not guilty; and found against him. And it was now moved in arrest of judgment, that the action lay not; for an action in the nature of deceit lies not where one sells a thing which he hath not any property in: and although he took upon him in discourse that he was an owner, and had right to sell, unless he warrants that the other should enjoy it accordingly (such warranty ought to be at the time of the sale), it is not good: but here is not any warranty nor affirmance at the time of the sale, that he had any right or title to sell; for his affirmance that he was vicar, and had a right to sell, was upon the ninth of *June*, and the sale was 16th *June* after; and in proof hereof he relied upon 5. Hen. 7. pl. 41.; 9. Hen. 7 pl. 21. and *Chandler v. Lopus*, *Ante*, 4.

TANFIELD, *Chief Baron*, and ALTHAM, were of that opinion. But if a man sell victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth; as 9. Hen. 6. pl. 53; 7. Hen. 4. pl. 15. and 11. Edw. 4. pl. 6. and although the Book of Assise, 12. Ass. pl. 8. was objected, where one took goods from another and sold them, and the owner retook them, that an action upon the case was brought in nature of deceit for this falsity in sale, without any warranty; TANFIELD thereto answered, that the said book is not adjudged, but the party admits it, and takes issue; yet if it were allowed to be law, it is because he there had possession by *tort*, and so had colour in shew to be owner; and he was deceived by buying of him who had only gained a *tortious* possession: and although he had not any right, yet every one took cognizance of him as owner, and he himself knew that he was not right owner; which is the reason that the action is maintainable; but here he had not any possession; and it is no more than if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he menting on the case of *L'Apostre v. Le Plaistrier* (1708), which is cited in 1 P. Wms. 318, said: "My account of that case is different from that in 1 P. Wms. . . . It was held by the court that offering to sell generally was sufficient evidence of offering to sell as owner."—Ed.

should have an action by the law, where he did not provide for himself. Wherefore it was adjudged for the defendant.¹

SERJEANT MAYNARD'S CASE.

HIGH COURT OF CHANCERY, 1676.

[2 *Freeman*, 1.²]

HE bought an Estate of one *J. S.* and upon the Bargain it was agreed, that a Recovery should be suffered within the Space of three Years, and he paying his Money before the Recovery was suffered, took a Bond of the Vendor, that if so be the Recovery was not suffered in the Space of three Years, that the Serjeant reconveying the said Lands should be repaid his Money; the Vendor tenders a Recovery, but before it was suffered, a third Person makes a Title to the Land, and thereupon the Serjeant exhibited his Bill to have his Money repaid. In this Case it was said by Mr. Attorney, that if a Man sell another's Land, and covenant to discharge it of such particular Incumbrances, and before the Payment of the Money other Incumbrances are discovered, this will prevent any Suit for the Money till all the Incumbrances are discharged.

It was said likewise by Mr. *Keck*, that if there be no Covenants against any Incumbrances, yet, if before Payment of the Money any are discovered, the Party may retain his Money till they are cleared; *quod fuit concess. per Cancellar'*. But it was said by Sir *John King*, and not denied *per Cur'*, that those must be Incumbrances made by the Vendor himself, or otherwise the Party cannot detain the Money, unless they be covenanted against. But in this Case the Lord Chancellor [Nottingham] said he could give no Relief: for here the Serjeant hath parted with his Money, and taken a Bond for Repayment of it if the

"I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands: for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it," per *BULLER, J.* in *Pasley v. Freeman* (1789) 3 T. R. 51, 56.

"Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty: but the common law bindeth him not, unless there be a warranty, either in deed or in law: for *caveat emptor*."—Co. Litt. 102a.

See Thomas & Fraser's note to Walker's case (1589) 3 Rep. 22a.—Ed.

²The case is also reported in 3 Swanston 651, and, after a reargument, *ib.* 653. In the first of these, Lord NOTTINGHAM is quoted thus: "Shall the loss fall upon the defendant, too, when he hath sold it without any covenants or warranties, and without any other conditions than what are performed? *Caveat emptor* is a very needless advice, if the chancery can establish another rule instead of it, by declaring that equity must suffer no man to have an ill bargain."—Ed.

Recovery were not suffered in three Years time, he reconveying his Estate; and here the Recovery being suffered, he hath no Pretence by his own Agreement to have it repaid; and this Court cannot help him, unless it should take upon itself, where any Man had a bad Bargain, or was cheated in his Title, to help him to his Money again; and here being no manner of Fraud or Surprise in the Case, if he be not helped by his Covenants, he will not be helped in Equity; but for the Matter of Reconveying, he held that if the Serjeant should reconvey such Title as he had from them, be it more or less, or none at all, yet being a Relative to convey, it would have been well enough; but here the Recovery being suffered according to the Agreement, though nothing passed by it, he held the Party had well performed his Agreement, and so no Reconveying nor Repayment of the Money to be made.¹

¹Accord, on demurrer, *Unston v. Pate* (1794) 4 Cruise, 90.—Ed.

"It does not appear to be clearly settled how far, or in what cases, this court will interfere to rescind a contract of sale, after it has been consummated by the execution of the conveyance, without any covenants of warranty, where there is no fraud, but where both parties were under a mistake as to the title of the vendor. By the civil law, an action of redhibition, to rescind a sale and to compel the vendor to take back the property and restore the purchase money, could be brought by the vendee, wherever there was error in the essentials of the agreement, although both parties were ignorant of the defect which rendered the property sold unavailable to the purchaser for the purposes for which it was intended. This principle of the civil law appears to have been followed in the courts of some of our sister States; and the case of *Hitchcock v. Giddings*, 4 Price, 135, must have been decided by Chief Baron RICHARDS, on the same principle. I agree, however, with the learned commentator on American law, that the weight of authority, both in this State and in England, is against this principle, so far as a mere failure of title is concerned; and that the vendee, who has consummated his agreement by taking a conveyance of the property, must be limited to the rights which he has derived under the covenants therein, if he has taken the precaution to secure himself by covenants of warranty as to title [*Simpson v. Hawkins*, 1 Dana's Kent, 305]. And where he has neglected to take such covenants, and there is no fraud or misrepresentation in the case, he has no remedy to recover back the purchase money upon a subsequent failure of title." WALWORTH, Chancellor, in *Bates v. Delavan* (1835) 5 Paige, 299, 306.

"Now, if a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase money, that is certainly a fraud, although both parties should be ignorant of it at the time. . . . A contingency may certainly be sold on speculation, but not such as was sold here. Two parties are not to be allowed to enter into an agreement to deceive each other. . . . I must not be told that a Court of Equity cannot interfere where there is no fraud shown. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of Equity; but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive £5,000 and interest because the

IN *Abbott v. Allen* (1817) 2 Johns. Ch. 519, S. C. 7 Am. Dec. 554 and note, the plaintiff had contracted to purchase certain real estate, on which he had paid part of the purchase money, giving a bond and mortgage for the balance. He had entered into the possession and, at the time of filing his bill, was still undisturbed. He now sought relief on the bond, alleging his vendor's defective title. In denying the prayer, Chancellor KENT said: "This case comes within the general doctrine declared in *Bumpus v. Platner*, 1 Johns. Ch. Rep. 213-218, that a purchaser of land, who is in possession, cannot have relief here against his contract to pay, on the mere ground of defect of title, without a previous eviction. But, without resting on the opinion there delivered, I have again examined the question, inasmuch as the doctrine in that case was doubted by the learned counsel who opposed this motion.

"If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropriate tribunal for the trial of titles to land. It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and of all proceedings at law to recover it.¹ Can this Court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into Court against his will, to assert or renounce a title which he never asserted, and, perhaps, never thought of? I apprehend conveyance is executed and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a Court of Equity could not interfere to relieve the purchaser."—Per RICHARDS, Chief Baron, *Hitchcock v. Giddings* (1817) 4 Price, 135, 140-141. See as to fraud, *Hilliard, Vendors* (2d ed.) c. xxii; *Sugden, I. Vendors*, 4 *et seq*; *Story, I Equity*, § 184 *et seq*; and see also *Bostwick v. Lewis* (1814) 1 Day, 250; S. C. 2 Am. Dec. 73 and note.

"There is no color for a charge of misrepresentation or fraud on the part of the grantors. I do not understand that any such charge exists in the answer, or was intended by it as a substantial ground of defence, though such a charge is now put forward by the defendant's counsel, as one of their points. But it is requisite that the charge of fraud should be made a distinct ground of allegation by the party in *pleading*, otherwise, it is not to be deemed in issue, and cannot affect the contract in question. This was the clear and decided doctrine of the Court of Errors in *James v. McKernon*, 6 Johns. 543, and that case may be considered as perfectly in point as to this part of the defence."—Chancellor KENT, in *Gouverneur v. Elmendorf* (1821) 5 Johns. Ch. 79, 82.—ED.

¹See on this point and also on question of fraud the well-considered opinions in *Beale v. Seiveley* (1837) 8 Leigh, 659.—ED.

hend there is no such practice or doctrine in this Court; and that a previous eviction or trial at law is, as a general rule, indispensable. Perhaps an outstanding encumbrance, either admitted by the party, or shown by the record, may form an exception, in cases of covenant against encumbrance. Some *dicta* in the books (see Serjeant Maynard's case, 2 Freeman, 1. and 1 Vesey, 88) seem to look to that point; but I have formed no opinion respecting it. The case of fraud is an exception; and it seems to be admitted by Mr. *Butler* (note 332 to Co. Litt. 384. *a.*) that if the purchaser was imposed on, by any intentional misrepresentation or concealment, he may have redress here, in addition to and beyond his covenants. The late case of *Edwards v. McLeavy*, Cooper's Eq. Rep. 308, is to this point. The purchaser, in that case, *before* any eviction was had or threatened, succeeded in a bill to set aside the conveyance, and for a return of the purchase money; but it was expressly upon the ground of fraud and imposition charged and proved; and the master of the rolls, in answer to the objection that the plaintiff was premature, inasmuch as he had not yet been evicted, and might perhaps never be, put the case on the ground of the fraud.

"There is no fraud charged in this case, and the bill has no such ground to support it;

"If there be no fraud, and no covenants taken to secure the title the purchaser has no remedy for his money, even on a failure of title.¹ This is the settled rule at law (*Frost v. Raymond*, 2 Caines, 188) and I apprehend that the same rule prevails in equity. 1 Fonb. 366, note; *Urmston v. Pate*, cited in Sugden's Law of Vendors, 3d. ed. 346, 347, and in 4 Cruise's Dig. 90, and in Cooper's Eq. Rep. 311. In the case of *Hiern v. Mill*, 13 Vesey, 114, the lord chancellor observed, that possession of land was no criterion of title, and that no person, in his senses, would take an offer of a purchase from a man, merely because he stood upon the ground. The purchaser must look to his title; and if he did not, it would be *crassa negligentia*. I know of no case in which this Court has relieved the purchaser where there was no fraud and no eviction; all the cases that I have looked into proceed on the ground of a failure of the title duly ascertained. Thus, in the imperfect note of the case of *Picketon v. Litecote*, 22 Eliz., cited in 21 Viner, 541, pl. 1, and sometimes referred to, process was awarded by chancery to have the purchase money refunded; but in that case it appeared by the defendant's answer, *that the plaintiff could not enjoy* the reversion of the copyhold which he had purchased; and in the *anonymous* case, in 2 Ch. Cas. 19, there was a previous eviction under a paramount title; but the authority of that case is questioned, in a note to the case itself, and in the subsequent books, which refer

¹See *Barkhamsted v. Case* (1825) 5 Conn. 528 S. C. 13 Am. Dec. 92, and note; *Banks v. Walker* (1845) 2 Sandf. Ch. 344; *Tallman v. Green* (1850) 3 Sandf. N. Y. Sup. Ct. Rep. 437. Story, Equity Juris. § 779.—Ed.

to it;¹ not, indeed, in respect to the necessity of a previous eviction, which the case may be considered as assuming, but on the ground that there was no covenant against paramount titles, and that the purchaser, as to them, took the conveyance at his peril. In *Serjeant Maynard's case*, 2 Freeman's Rep. 1, referred to in the passage cited by the counsel from *Viner*, the lord chancellor said, that there being no fraud or surprise in the case, if the party was not aided by his covenants, he would not be helped in equity; and yet the purchase money had been paid, and a third person had made title. There are some loose *dicta* (for which I presume the case was referred to), but they are without any fulness of illustration, and want that precision which is requisite to give much force to them. The decision in the case is strong against the pretension of the present plaintiff; for though a third person had made title, and the plaintiff had paid his purchase money, yet, in consequence of a positive agreement with the vendor, he was rigorously denied any relief, and left to his remedy, if any, at law. So again, in *Bingham v. Bingham*, 1 Vesey, 126, on a bill to have purchase money refunded on a mistake in title, the mistake had appeared in an *ejectment at law*. It appears to me that this principle pervades the cases."²

Frost v. Raymond (1804) 2 Caine, 188. The plaintiff brought an action for breach of an implied covenant as to warranty of title. KENT, Ch. J., delivered the opinion of the court. "Several objections

¹See *Tucker v. Gordon* (1809) 4 Desaus. 53.—ED.

²In the case of *Johnson v. Gere* (1817) 2 Johns. Ch. 546, decided less than a month later, the plaintiff had purchased land and gone into possession, giving a bond and mortgage for the purchase money. While the vendor was prosecuting at law on the bond and advertising the mortgaged premises for sale, other parties claiming a superior title were suing the plaintiff in ejectment. The plaintiff filed a bill praying for an injunction to stay the prosecution on the bond and mortgage. "The Chancellor [KENT] granted the injunction, and distinguished this case from those wherein there was only an allegation of an outstanding title, and no disturbance, prosecution, or eviction thereon. Here, he said, the party was actually prosecuted by an action of ejectment, on the ground that the title derived from the defendant was defective. The defendant is entitled, and it will be his duty to defend the ejectment suit; and until that is disposed of, he ought not to recover the remaining moneys due on the bond."

To entitle a purchaser to relief, it is said he must show not only a defective title, but no remedy at law. *Payne v. Cabell* (1828) 7 Mon. 198; it is also said a mere cloud on title will not constitute such a defect; it must be a defect in law. *Sir Samuel Romilly v. James* (1815) 6 Taunt. 263. "If the covenants have been actually broken and the grantor is insolvent, a Court of Equity may restrain him from proceeding to collect the whole amount due for the purchase money, and may offset the damages occasioned by the breach of the covenants of seisin or of warranty against such unpaid purchase money. *Simpson v. Hawkins*, 1 Dana's Rep. 305; 2 Ch. Ca. 19."—*Woodruff v. Bunce* (1842) 9 Paige, 443; S. C. 38 Am. Dec. 559, and note. Successfully to resist specific

are taken to the validity of the declaration. I shall however confine myself to the first and only important one viz. *That here was no implied covenant or title.* It is exceedingly interesting to the community, that this Question should be clearly settled and well understood. We are to examine.

"1. Whether a sale of an estate in fee, by the formal and apt words of conveyance, and for a valuable consideration, does of itself imply a warranty or covenant of title. The counsel for the plaintiff contended upon the argument that it did.

"I. It seems upon the first impression to be highly reasonable and just, that every person who, for a valuable consideration, conveys land as his own, should be held to warrant the title he so undertakes to convey, or that he should render back the money upon failure of the title. This was the rule of the *civil law* in respect to the sale of both real and personal property, concerning which, that system scarcely made a distinction, an adequate price implying a warranty. Cod. lib. 8. tit. 45. ch. 6; Dig. Lib. 19. tit. 1. ch. 11. § 2; Lib. 21. tit. 2; 1 Domat. 79. 82. 83; 1 Ersk. Inst. 203. In the early ages of the *feudal law*, it seems also to have been considered as an obligation upon the lord, to give his tenant an equivalent in case of eviction. This appears clearly from the book of feuds, which gives the report of a case of an action by the tenant against his lord, for investing him with a feud belonging to another, and from which he was evicted. The lord was there held to restore him another fee of equal value, or the price of it in money. Feud. lib. 2. tit. 25 & 80. But although the feudal writers speak *generally* of the lord's obligation to give the tenant an equivalent in case of eviction, Craig, and after him Sir Martin Wright, thinks this obligation never could have applied to pure feuds, which were gratuitous donations for uncertain military services, without price or stipulated render; and that it could only have applied to improper feuds, where it was reasonable it should apply, as in those cases a price was given, or an equivalent contracted for. Int. to the law of tenures, 27. 32. 39. 40. This very question, whether investiture alone, without any express promise, entitled the tenant on eviction to an equivalent, has, it is said, been much discussed by the foreign civilians. That it is the prevailing opinion among them, that the seller, without any promise, is bound to give an equivalent, if the fief was originally granted for services done, or in the way of remuneration. Butler's note 315. to Co. Lit.

performance of a contract to purchase real estate for defect of title, "there must at least be a reasonable doubt as to the vendor's title—such as affects its value and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record title may, under certain circumstances, furnish a defence to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title."—*Hellreigel v. Manning* (1884) 97 N. Y. 56, 60.—Ep.

"But whatever may be our opinions on the point, as an abstract question, or whatever may be the decisions of the civil law, or the feudal and municipal law of other countries, we must decide this question by the common law of England. It was decided in the case of Seixas and Wood, Ante 48, that upon a sale of goods, without warranty, and without deceit, the purchaser took the soundness and quality of them at his peril. I think it is evident that *caveat emptor* has been always recognized in our law books, as a fixed maxim, applicable equally to the transfer of lands and chattels.¹

"It is a settled position that an estate in fee may be created by the usual and solemn forms of conveyance, without any warranty express or implied, and that a conveyance in fee does not *ipso facto* imply a warranty. If it does, our books would be inconsistent and unintelligible on this subject. "If a man," says Lord COKE, 1 Inst. 6. a., and also say the judges in Buckhurst's case, 1 Co. 1., "maketh a feoffment in fee, *without warranty*, the purchaser is entitled to all the charters and evidences incident to the lands, to the end that he may defend himself; for, as the feoffor is not bound to warrant the lands, he cannot be vouched to warranty and to render in value, but the feoffee is to defend the lands *at his peril*." In the case of Roswell and Vaughan, 2 Cro. 196, in the exchequer, TANFIELD the chief Baron said, "that if one should sell lands, wherein another is in possession, or a horse, whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself." So in the case of Medina and Stoughton, 1. Salk. 211, lord HOLT observed "that if the seller of goods have not the possession, it behoves the purchaser to take care, *caveat emptor*, to have an express warranty or a good title; and so it is in the case of land, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see it." In a much more recent case of Bree and Holbech, Doug. 654, the action was brought to recover back money paid for the purchase of a mortgage deed, which afterwards turned out to be a forgery. Lord MANSFIELD, and the court of king's bench, ruled for the defendant on this ground; that the assignment contained no covenant for the goodness of the title, except only against the acts of the assignor, and that it was incumbent on the purchaser to look to the goodness of it. This case was afterwards cited and sanctioned by Lord KENYON, 6. D. & E. 606. who said, that he did not wish to disturb the rule

¹There is no implied warranty of title by an executor on a sale, *Joslin v. Coughlin* (1853) 4 Cush. (Miss.) 134; *Storm v. Smith* (1870-71) 43 Miss. 497; nor by a trustee, *Fleming v. Holt* (1877) 12 W. Va. 143. One buying from the State buys at his peril, *Webster v. Clear* (1892) 49 Ohio St. 392; as does one purchasing a patent, *Hall v. Cender* (1827) 2 C. B. N. S. 22. See on this point, *Taylor v. Hare* and *Marston v. Swett*, with notes, *ante*.—ED.

of *caveat emptor* adopted in that case, and in other cases, where a regular conveyance was made, to which other covenants were not to be added.

"This case in Douglas may perhaps be thought to have the less weight as there was a covenant against the grantor's own acts, and it is a rule that an express covenant will do away the effect of all implied ones. 4 Co. 80. 6. Vaugh.; 126. Cro. E. 674, 5. Butler's notes on Co. Litt. 332; 2 Bos. & Pul. 26; 2 Ch. Ca. 19. But the court do not intimate that they proceeded upon that ground. This they would have done, had they relied upon the extinguishment of the implied covenant by means of the express one. They adopted the old rule, that if there be no covenant of title in a deed, the purchaser takes at his own risk, the goodness of the title.

"After this rule has been so long understood and practiced upon, it would be of the most mischievous consequence to establish a contrary doctrine. The parties to deeds know that a covenant is requisite to hold the seller to warrant the title, and they regulate their contracts accordingly. If there be any fraud in the sale the purchaser has his remedy. If one sell land, affirming he had a good title, when he knew he had no title, an action on the case for a deceit, will lie Com. Dig. tit. action on the case for a Deceit, A. S. 1 Fonb. 366."

MARTIN v. MCCORMICK.

COURT OF APPEALS, 1854.

[8 *New York*, 331.]

THE appeal in this action was from a judgment of the superior court of the city of New York. The questions decided arose upon the pleadings. The plaintiff sought to recover as money received by the defendant to his use.

The action was tried before Mr. Justice Mason, at special term, who ordered a judgment for the defendant which was affirmed at general term. (See 4 Sand. 366.) The plaintiff appealed to this court.

JOHNSON, J., delivered the opinion of the court. In this case the defendant was in possession of an instrument under the seal of the corporation of the city of New York, by which there purported to be created in him an estate for the term of one hundred years, in a house and lot of land in the city of New York. The plaintiff was at the time in possession of the house and lot, claiming to be and being seized thereof in fee, unless the lease held by the defendant created a valid term for years in him. The defendant as matter of fact be-

lieved, the lease did give him the term which it purported to convey. The plaintiff also so believed, and thereupon a bargain was entered into between them in pursuance of which the plaintiff paid the defendant \$1800, and received in consideration thereof an assignment of the term. The plaintiff now seeks to recover back this money upon the general ground, that the defendant, notwithstanding his apparent interest in the premises, had no estate in them whatever, the lease from the corporation being invalid, and that he purchased the lease and paid the money under an entire misapprehension and mistake as to the facts upon which depended the validity or invalidity of the defendant's lease.

This is not the case of money paid by a party under a mistaken idea of the existence of a legal obligation binding him to pay it; nor that of a party seeking to resist the performance of an executory contract to pay money, entered into under such circumstances of mistake. Of this latter sort was *Bell v. Gardiner*, 4 Man. & Gr. 11, in which the action was upon a promissory note given by the defendant for the amount of a bill of exchange on which defendant was endorser, but which had been altered after endorsement, whereby he ceased to be liable. The jury found that the defendant when he gave the note had no knowledge of the alteration, but the judge refused to submit to them the question whether the defendant had the means of knowledge. All the judges held that, this being only a promise to pay, the defendant's position was much stronger than if he had been plaintiff in an action to recover back the money; but as the case had been argued on its analogy to a claim to recover back money paid, they considered it in that light also, and approved of *Kelly v. Solari*, 9 M. & W. 54, in which they held it to have been determined, that in an action to recover back money paid under a mistake of facts, it was not necessary to negative means of knowledge as well as knowledge of the true state of the facts.

Kelly v. Solari, belonged to the former class. It was an action to recover back the amount paid by an insurance company upon a life policy, which the insured had by mistake permitted to expire. The fact that it had lapsed was known to the officers of the company, who afterwards having forgotten the facts paid the loss. The court held that this fact of forgetting was no answer to the action. It is not necessary to pursue this line of cases, for they do not touch any ground upon which this plaintiff can succeed. He has entered into a contract which has been executed, and his position is that of one seeking to rescind the contract and get back the consideration paid. No case of fraud is pretended. *McCormick* and the plaintiff both believed that the lease was valid, and one bought and the other sold under that belief.

The parties did not deal with each other upon the footing of the compromise of a doubtful or doubted claim, but upon the ground

of a conceded right in the defendant. He was assumed by both of them to have become the owner of a term for one hundred years in the premises in question, and the parties dealt with each other upon that basis for the sale and purchase of that interest.

Then as to the subject matter upon which the sale was to operate, the plaintiff having actually redeemed the premises before the execution of the lease to the defendant, the authority to convey which the corporation had acquired was defeated, and their lease was wholly inoperative to confer upon the defendant any right whatever, and had no more significance or efficacy in law than if it had remained unexecuted. It follows, that the assignment executed by McCormick to Martin did not convey to him any right. The subject matter to which it related had no existence.¹ The plaintiff in my judgment occupies the same position which any other person would have occupied who had dealt with the defendant for the term of one hundred years, and become the purchaser of it.

Now the term which was the subject of the contract, contrary to the supposition of both parties had no existence, and in all that class of cases where there is mutual error as to the existence of the subject matter of the contract, a rescission may be had (1 Story Eq. §§ 141, 142, 143). The case of *Hitchcock v. Giddings*, 4 Price, 135, was a bill by a vendee of a remainder in fee expectant upon an estate tail. A recovery had been suffered at the time of the contract, though both parties were ignorant of the fact, and there had been no fraud from knowledge or concealment of the fact, and it was decreed that a bond given for the purchase money should be delivered up, and the interest which had been paid upon it should be refunded.

I do not see how the principle of this case can be distinguished from that at bar; for surely it can be no ground of difference in result, that in the one case an estate which had once existed had at the time of the contract come to an end, while in the other the estate which was the subject of the contract had no existence at any time. *Allen v. Hammond*, 11 Pet. 71.

The judgment below should be reversed, and the sale be declared rescinded, &c.

RIGGLES, Ch. J., and GARDINER, JEWETT, TAGGART, MORSE and WILLIARD, JJ., concurred.

MASON, J., was in favor of modifying the judgment of the superior court, so as to dismiss the complaint without prejudice to an action for specific relief, by avoiding the contract for the purchase of the lease.

Judgment reversed, &c.²

¹While this case illustrates the doctrine of the preceding section, it is placed here as showing when the rule of *caveat emptor* fails as to reality.—En.

²In *Cripps v. Read* (1796) 6 T. R. 606, the plaintiff was permitted to re-

(3) *Mistake as to the Validity or Amount of the Claim, or as to a Collateral Fact.*

PRICE v. NEAL.

KING'S BENCH, 1762.

[3 *Burrow*, 1354.]

THIS was a special case reserved at the sittings at Guildhall, after Trinity term, 1762, before Lord MANSFIELD.

It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Edward Neal was indebted to him in £80 for money had and received to his the plaintiff's use; and damages were laid to £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows:—

"Leicester, 22d November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas

cover as money had and received the purchase price of leasehold interest, to which the defendant, the seller, had no interest; and so as to purchase of land in *Johnson v. Johnson* (1802) 3 B. & P. 162; but in both these cases everything passed in parol, no deeds being given. See *Taylor v. Read* (1872) 19 Minn. 372; *Pipkin v. James* (1839) 1 Humph. 325, S. C. 34 Am. Dec. 652.

"If the title fails for want of authority in the person who makes the deed to act in the capacity in which he professes to act, the consideration may be recovered back. *Shearer v. Fowler*, 7 Mass. 31; *Williams v. Reed*, 5 Pick. 480; *Dill v. Wareham*, 7 Met. 438; *Holden v. Curtis*, 2 N. H. 61."—*Earle v. Bickford* (1863) 6 Allen 549, 550. So, if title fails because the land is seized by the grantor's creditors, *Leach v. Tilton* (1860) 40 N. H. 473.

One hypothecating collateral does not warrant the title, *Ketchum v. Bank of Commerce* (1859) 19 N. Y. 499.

See also *Thomas v. Bartow* (1872) 48 N. Y. 193; *Campbell v. Brown* (1842) 6 How. (Miss.) 106.

In suit to recover money paid by purchaser of real estate, alleging defective title, the court said, citing *Hellreigel v. Manning* (1884) 97 N. Y. 56: "We disagree with the court at general term upon the necessity in such case as this of showing that the title is absolutely bad. We think that if there were a reasonable doubt, such as to effect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, the plaintiff's cause of action would be sustained." *Methodist Episcopal Church Home v. Thompson* (1888) 108 N. Y. 618: But in *Bernei v. Mayor* (1881) 56 Md. 351, it was held that to defeat an action for recovery of purchase money, a perfect title must be given.

In an action on a note given for the purchase price of land, the defendant was not permitted to show a partial or even total failure of title. *Lloyd v. Jewell* (1821) 1 Greenl. 352; *Hammatt v. Emerson* (1847) 27 Me. 308 S. C. 46 Am. Dec. 598 and note; In *Tourville v. Naish* (1734) 3 P. Wms. 307, it was said that one sued on bond given for purchase of land, on which was an

Poughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." Indorsed "R. Ruding, Antony Topham, Hammond, and Linoche. Received the contents, James Watson and Son; witness Edward Neal."

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill; which was done accordingly.

That another bill was drawn as follows:—

"Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received, for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "Accepted John Price;" and that plaintiff wrote on the back of it: "Messieurs Freame and Barclay, pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

equitable incumbrance, of which he had no notice at time of purchase, could, on such suit being brought, go into equity and secure order permitting him to retain sufficient from amount due to discharge the incumbrance. See also *Bowan v. Thrall* (1856) 28 Vt. 382.

"He who purchases a tract of land, knowing the title to be defective, takes the risk upon himself. *Alexander v. Kerr*, 2 Rawle, 90; *Walker v. Quigg*, 6 Watts 90."—*Rohr v. Kindt* (1842) 3 W. & S. 563, 565, S. C. 39 Am. Dec. 53, and note; and see *Caswell v. Manufacturing Co.* (1817) 14 Johns. 453.

As to the necessity of an eviction, either as a defence to suit for purchase money, or as an essential for recovering purchase money paid, see *Frisbee v. Hoffnagle* (1814) 11 Johns. 59; *Vibbard v. Johnson* (1821) 19 Johns. 77; *Whitney v. Lewis* (1839) 24 Wend. 131.

For discussions of question of damages for breach of covenant to convey, see *Flureau v. Thornhill* (1776) 2 Wm. Black. 1078; *Bain v. Fothergill* (1874) L. R. 7 H. L. 158; *Kirkpatrick v. Downing* (1874) 58 Mo. 32; S. C. 17 Am. Rep. 678 and note; also notes in 58 Am. Rep. 608-614; 39 Am. Dec. 56; and an article by Washburn in 11 Alb. L. J. 280.

As to what satisfies a contract to convey in fee, see *Fuller v. Hubbard* (1826) 6 Cowen, 13, S. C. 16 Am. Dec. 423, and note; or a contract to convey a good title, *Tinney v. Ashley* (1832) 15 Pick. 546, S. C. 26 Am. Dec. 620 and note; *Demesmey v. Cavelin* (1870) 56 Ill. 93; and see 2 Hilliard, Vendors 39 *et seq.*, and note on page 46; note 11 Am. Dec. 34; or a contract to convey all one's right, title, and interest. *Johnson v. Tool* (1833) 1 Dana, 479, S. C. 25 Am. Dec. 162 and note.

And see on the subject of mistake and failure of title generally, Rawle, Covenants, § 319 *et seq.*; Sugden, Vendors, xiii, sec. ii.—Ed.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff, and assessed damages £80 and costs 40s., subject to the opinion of the court upon this question,—

“Whether the plaintiff, under the circumstances of this case, can recover back from the defendant the money he paid on the said bills, or either of them.”

Mr. Stowe, for the plaintiff, argued that he ought to recover back the money, in this action, as it was paid by him by mistake only, on supposition “that these were true genuine bills;” and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guildhall, of *Jenys v. Fowler et al.*, 2 Str. 946 (an action by an indorsee of a bill of exchange brought against the acceptor), Lord RAYMOND would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer to swear “that they believed it not to be so;” and he even strongly inclined, “that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee.”

But he urged, that in the case now before the court the forgery of the bill does not rest in belief and opinion only, but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated “that that bill was accepted before it was negotiated;” on the contrary, the consideration for it was paid by the defendant before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and therefore the reason, upon which Lord RAYMOND grounds his inclination to be of opinion “that actual proof of forgery would be no excuse,” will not hold here.

Mr. Yates, for the defendant, argued that the plaintiff was not entitled to recover back this money from the defendant.

He denied it to be a payment by mistake, and insisted that it was rather owing to the negligence of the plaintiff, who should have inquired and satisfied himself, “whether the bill was really drawn upon him by Sutton, or not.” Here is no fraud in the defendant, who is stated “to have acted innocently and *bona fide*, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills.”

Lord MANSFIELD stopped him from going on, saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery.¹

Here was no fraud; no wrong. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had *actual encouragement* from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or

"There is in the language of the authorities cited nothing unconscientious in the defendant's retaining the money, and no reason why the loss as between parties thus equally innocent and equally deceived, but where one is bound to know and act upon his knowledge, and the other has no means of knowledge, should be thrown upon the latter in exoneration of the former. The safest rule for the commercial public, as well as the most consistent with justice is to allow the loss to remain where, by the course of business, it has been placed." —*Commercial & Farmers' Nat. Bank v. First Nat. Bank* (1868) 30 Md. 11, 22.

"The plaintiff, in fact, never asked to see the draft, but of his own accord paid it without sight. If negligence is chargeable to either party, it is clearly with the plaintiff in paying the draft under such circumstances. But if, in this respect, the parties stand on an equal footing, then the loss must fall upon him who has paid the money rather than upon him who has received it, both parties acting in good faith. In the *Gloucester Bank v. Salem Bank*, 17 Mass. 41, a case in principle like the one at bar, PARKER, J., in delivering the opinion of the Court, says: 'The just and sound principle of decision has been that, if the loss can be traced to the fault or negligence of either party, it should be fixed on him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it.' —*Bernheimer v. Marshall & Co.* (1858) 2 Minn. 78, 83.—Ed.

negligence in any one, it certainly was in the plaintiff, and not in the defendant.

Rule; that the *postea* be delivered to the defendant.¹

That the drawee or acceptor must know the signature of the drawer, see *Gloucester Bank v. Bank* (1820) 17 Mass. 33; *Levy v. U. S. Bank* (1810) 1 Binney, 27, S. C. 4 Dall. 234; *National Bank of Commerce v. Grocers' National Bank* (1867) 2 Daly, 289, S. C. 35 Howard Prac. 412; *Stout v. Benoist* (1866) 39 Mo. 277; *Howard v. Mississippi Bank* (1876) 28 La. Ann. 727, overruling the earlier case, *contra*, *McKleroy v. Southern Bank of Kentucky* (1859) 14 La. Am. 458; *Salt Springs Bank v. Syracuse Savings Bank* (1863) 62 Barb. 101.

But the drawee is not bound to know the signature of the payee, *Insurance Co. v. Bank* (1881) 60 N. H. 442, as against a *bona fide* holder, *Carpenter v. Northborough National Bank* (1877) 123 Mass. 66. See also *Talbot v. Bank of Rochester* (1841) 1 Hill, 295; *Arnold v. Cheque Bank* (1876) 1 C. P. D. 578. See Norton, Bills and Notes, § 70, 71; Bigelow, Bills, Notes, and Cheques, 223 *seq.*

"The rule established by *Price v. Neal*, that a drawee pays (or accepts) at his peril a bill, on which the drawer's signature is forged, has been repeatedly recognized both in England and the United States. The same rule prevails in Scotland and on the continent of Europe. Unfortunately, there is not a similar unanimity as the reason of the rule. The drawee's inability to recover the money paid is often referred to his supposed negligence. He ought, it is said to know the signature of the drawer. Against this view two sufficient objections may be urged. In the first place, negligence on the part of the payor is not, in general, a bar to the recovery of money paid under a mistake. If, for instance, a creditor receives payment of a debt, which has already been paid, although he may have received the money in good faith, and the debtor may have paid in careless forgetfulness of the prior payment, it is obviously unjust for the creditor to retain the second payment, and thereby enrich himself at the expense of the debtor. Secondly, if the drawee's negligence were the test, he ought to be allowed to show, in a given case, that he was not negligent; for example, that the forgery was so skilfully executed as naturally to deceive him. But such evidence would not be received. If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free from blame and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril."

"Another so-called explanation of the rule, that the drawee pays a forged bill at his peril, has obtained great currency; namely, that the drawee is 'conclusively presumed to know,' or is 'estopped to deny,' the signature of the drawer. These expressions are repeated by text-writer and judge, apparently without a suspicion of their worthlessness as an explanation of the rule in question. Yet to one asking why the drawee pays at his peril, it is no sufficient answer to say, that the drawee is conclusively presumed to know the drawer's signature. A conclusive presumption of the drawer's knowledge means simply that his ignorance, whether culpable or excusable, is an irrelevant fact. The question, therefore, immediately recurs: Why is the drawee's excusable ignorance an irrelevant fact?"

"The holder's right to retain the money paid him by the drawee has some-

ELLIS & MORTON v. OHIO LIFE INS. AND TRUST CO.

SUPREME COURT OF OHIO, 1855.

[4 *Ohio State*, 628.]

ERROR to the Superior Court of Cincinnati.

The original action was one of *assumpsit*, brought in the court of common pleas of Hamilton county, December 29th, 1852, but removed to the superior court of Cincinnati, by consent of parties, May 11th, 1854. The declaration is for money had and received, money paid, money lent, and money found to be due on an account stated. The pleas is the general issue.

On the 14th of June, 1854, at a special term of the superior court, held by the Hon. Bellamy STORER, the cause came on to be tried by jury. When the plaintiffs had produced all their evidence and rested, the defendants moved for a nonsuit, which, after argument, was granted. Whereupon a bill of exceptions, presenting all the evidence, times been placed upon the ground, that, in consequence of the payment, he has lost the right of recourse against prior indorsers, which he would have had, in case the bill had been dishonored. There seems to be great force in this argument. But, if the holder's right of retention were founded solely upon this argument, it would follow that in cases where there were no prior indorsers, he would have to refund the money to the drawee. But the decisions show that the drawee pays at his peril in these cases also. The holder's right to retain the money must depend, therefore, upon a more comprehensive principle than that of the loss of rights against prior indorsers.

"The true principle, it is submitted, upon which cases like *Price v. Neal* are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of *assumpsit* for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage. The same reasoning applies if the drawee has merely accepted the bill. The legal title to the acceptance is in the holder. A court of equity ought not to restrain the holder by injunction from enforcing his legal right, nor should a court of law permit the acceptor to defeat his acceptance by an equitable defence.

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"It is hoped that what has been written may serve to convince the reader of the extensive scope of the doctrine that equity will not interfere as between two persons having equal equities, but will let the loss lie where it has fallen. It will certainly be a satisfaction to the writer, if he has helped to vindicate the opinion of Lord MANSFIELD in *Price v. Neal* from the false gloss that has been put upon it by his successors."—AMES, "The Doctrine of *Price v. Neal*," 4 *Harvard Law Review*, 297. And see Keener's *Treatise*, 154 *et seq.*

was signed by the judge and made part of the record. The plaintiffs filed their petition in error to the superior court, at the general term of the superior court, October, 1854; assigning for error, that the court, at special term, erred in rendering said judgment of nonsuit. The superior court, at general term, affirmed the judgment at special term. To reverse this judgment of affirmance, the present petition in error is filed on leave.

The facts sufficiently appear in the judgment of the court.¹

RANNEY, J. Having settled the principles by which our inquiries are to be guided, we are now prepared to ask the question—Were the plaintiffs properly nonsuited in the present case? An answer to this question demands a careful attention to the evidence contained in the bill of exceptions, and a settling of the state of facts that it conduced to prove, and then the legal principles applicable to such a state of facts.

There has been, and can be, no dispute that the money, for which this action was brought, was paid by the plaintiffs, and received by the defendants, on a check for \$7,500, purporting to be drawn upon the plaintiffs by Evans and Swift, a firm at Cincinnati engaged in the pork packing business, and payable to Samuel Taylor & Co., or bearer; and that the check was a forgery, of which the parties were mutually ignorant at the time the payment was made. This check, with another for \$7,300, purporting to be drawn by S. Davis & Co., on the Mechanics' and Traders' Bank, and which was also a forgery, was presented in the early part of the day it bears date, by a stranger having the dress and appearance of a drover, and expressing a desire to exchange them for Kentucky money or gold, to the teller of the defendants' bank, by whom they were taken and the gold advanced, at a discount of $\frac{1}{2}$ of one per cent. He testified that "he did not know the standing of either firm, nor their signatures, but took the checks to Mr. Bishop, the cashier, laid them on his desk, and asked him if he should make the exchange. He [Bishop] said yes. Cannot say whether he examined or knew the signatures. The checks were before him some three or four minutes. He assisted in calculating the premiums. *No question was asked as to who the presenter was, or as to his right to the checks.* He was probably in the bank from two to fifteen minutes; should not have recognized him again. He carried off the gold in saddlebags. Both the banks, upon which the checks were drawn, were within less than a square; there was nothing to create suspicion, and nothing unusual in the transaction."

In accordance with a custom of doing business between the banks, and, to some extent, with other banks of the city, this check, with others drawn upon the plaintiffs and taken by the defendant, were

¹The elaborate arguments of counsel have been omitted and only a part of the opinion of the learned judge is given.—Ed.

pinned together, with a ticket upon the top showing the amount of each and the aggregate amount of all, and on the same day presented to the plaintiffs, who paid the amount appearing from the ticket, without any examination of the checks; it being the custom, however, to examine them on the same day, and return such as were found not to be good. This check was examined, on the same day, by the note clerk of the plaintiffs, and charged up against the supposed drawers. The forgery was not discovered until ten days afterwards, when the check was returned to the defendants and repayment demanded.

For the purpose of showing what was claimed to be gross negligence on the part of the defendants, the plaintiffs introduced several witnesses engaged in the business of banking at Cincinnati, who expressed the opinion, that the defendants, in the exercise of proper diligence, should have required the person presenting the check to have drawn the money himself; or should, by inquiry, have been satisfied of his right to do it, and of his identity. As expressed by one of them:—*"It is the general custom in this city, when a check is presented for sale, that is, when it is presented by a stranger to a bank, not the one upon which it is drawn, to make inquiries in reference to his right to the check, and the identity of the person."* And with a view of making it appear that this negligence operated directly to their prejudice, and *induced the payment of the check*, the plaintiffs further gave evidence tending to prove their uniform custom of making such inquiries, when a check of this character, drawn upon them, was presented by a stranger; and that there was "not, generally, so strict a scrutiny when checks come from other banks, *it being presumed that caution had been already exercised.*" The tendency of this evidence cannot be mistaken. It clearly conduced to prove the existence of a general custom amongst the banks of Cincinnati, requiring the bank taking a check of this character, drawn upon another, from a stranger, to be satisfied, by inquiry, of his right to the check, and of the person from whom it was received; and as clearly allowing the bank, upon which it was drawn, to rely upon the presumption that such caution had been exercised, when the check was presented for payment. If this custom, in both its branches, was established to the satisfaction of the jury, the fair presumption arising would be, that the defendants had been negligent in failing to comply with an established custom of the business, necessary not only to their own security, but also to that of the bank upon which the check was drawn, and that the plaintiffs, not being informed to the contrary, paid the check upon the supposition that the custom had been observed; while it would be made absolutely certain that the intervention of the defendants had prevented the plaintiffs from exercising this precaution; and nearly so, that if it had been exercised by the defendants, the check would not have been purchased by them, or paid by the plaintiffs.

We do not say that the evidence was sufficient to establish this state of facts, or that it was not. It is enough that it had that tendency. It is wholly immaterial for present purposes, how weak and inconclusive it may have been, or, even, that it was contradicted by other evidence given by the plaintiffs. As was well said in the court below, "if the testimony be contradictory, it cannot all be admitted to be true; if not all true, judgment must be exercised in separating the true from the false; and this is the peculiar province of the jury."

Assuming all to be satisfactorily proved that this evidence conduced to prove, does the law permit a recovery? Upon this question we have bestowed the careful attention which the importance of the subject, as well as the learning and ability with which it was treated in the superior court, and by counsel in this court, seemed to demand, and a majority of the court are brought to the conclusion that it does.

There is, certainly, no room for the application of technical or arbitrary rules, in determining the rights of the parties. Neither the form of the action, nor the nature of the subject, permits it. The action is brought for money had and received; and it lies in all cases, where one has the money of another, which he cannot in equity and good conscience retain. It lies, therefore, for money paid by mistake, or upon a consideration which has failed; because in such case, the plaintiff did not intend to give his money to the defendant, and the latter cannot conscientiously retain money for which he has given no equivalent. This is the general rule; but it has its exceptions, as well settled and resting upon reasons as solid and satisfactory as the rule itself. Wherever the mistake has arisen from the fault or negligence of the party paying the money, and cannot be corrected without prejudice to the party who has received it, there can be no recovery, and simply because the plaintiff is alone in fault: the defendant is under no obligation to submit to loss, to extricate him from difficulty, and may, therefore, conscientiously retain the money. The question is, does this case fall within the general rule, or the exception? We make the solution of this question depend wholly upon the answer to be given to another: Does the negligence imputed to the defendants, subject them to an action for the recovery of the money paid upon the check? Can a party, upon whom an established course of business devolves the obligation of making certain inquiries, before taking a check purporting to be drawn upon another, in negligent disregard of that duty, *conscientiously* retain the money received upon a forged instrument, when it appears that such negligence contributed to induce the payment?

Whatever of doubt might have been once entertained, it has been long settled, that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness; and if it proves to

be a forgery, he is still liable for the debt, in the one case, or for a return of the money in the other. 2 Johns. Rep. 455; 6 Mass. Rep. 182; 5 Taunt. Rep. 488.

We admit it to be equally well settled, that, where the instrument is drawn upon, or purports to be signed by, the party paying the money, to a holder without fault, and whose situation would be thereby changed, to his prejudice if he was compelled to refund, the money cannot be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting, in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him *negligence*, and, as between him and the innocent holder, compels him to suffer the loss. For still stronger reasons, the drawee of a bill or check, who has accepted it, and again suffered it to go into circulation, is absolutely estopped to deny the genuineness of the drawer's handwriting. The acceptance necessarily involves the most positive affirmation that the instrument is what it purports to be, and the acceptor is not permitted to withdraw the assertion, to the prejudice of those who have, in consequence of it, given credit to the paper.

In all such cases, either of acceptance or payment, the foundation upon which the drawee is made to suffer the loss, is the imputed negligence in accepting or paying, until he has ascertained the bill to be genuine; and, in case of payment, notwithstanding he has done it in mistake, and parts with his money without receiving the supposed equivalent, and notwithstanding the holder has obtained the money without consideration, the former cannot be relieved from the consequence of his negligence at the expense of the latter, and the latter may in equity and good conscience retain what he has got. But this stern rule is only exerted in favor of a holder without fault, and for a valuable consideration; and we deem it equally clear, that he may, by his own negligent conduct, place himself in such an inequitable position in reference to the drawee, as to deprive himself of the benefit of this rule, and make it unjust and inequitable that he should keep what he has obtained by a mistake, and for which he has given no equivalent.

We do not here speak of negligence as a matter at large. We only intend to deal with the case before us; and that only requires us to say, that where the negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument. Both these propositions,

we think, will be found fully sustained, if not in every particular, by direct adjudications, by the fixed principles upon which nearly all the cases have proceeded.

The leading case is that of *Price v. Neal*, 3 Burr. R. 1355. It is not very clearly reported, and has been the subject of some misunderstanding in the subsequent cases. The action was brought to recover the money paid upon two forged bills of exchange, drawn upon the plaintiff; one of which was first accepted and afterwards paid, and the other paid upon presentation. Lord MANSFIELD lays some stress upon this circumstance; and he is very careful to say, that the "misfortune happened without the defendant's *fault or neglect*," and that whatever of negligence there was, was on the side of the plaintiff.

Without advancing any views of our own, as the true ground upon which the plaintiff was denied a recovery, it will be sufficient to present those of the supreme courts of Massachusetts and New York. In *Young v. Adams*, 6 Mass. R. 187, SEWALL, J., says, the strong ground for the decision, "although not so prominently stated by the reporter, was because the plaintiff's acceptance and payment of these false bills, considering them as drawn upon himself, *was his own peculiar negligence*, by which the loss had been incurred; and therefore it was not to be thrown back upon the innocent holder of the bills." And Ch. J. KENT, in *Markle v. Hatfield*, 2 Johns. R. 462, says—"That decision turned upon the negligence imputable to the one party, *and not to the other*."

In *Smith v. Mercer*, 6 Taunt. R. 80, the payment was made by the bankers of the party, who purported to have accepted the bill payable at their banking house; and the forgery was not discovered for a week afterwards. The court were of the opinion that no distinction was to be taken between a payment by the bankers of the acceptor, and the acceptor himself; and gave judgment for the defendant. But the judges were not unanimous: CHAMBER, J., expressing his dissatisfaction with the reasoning in *Price v. Neal*, thought the case came within the general rule of money paid by mistake, and could be recovered back; while GIBBS, C. J., being the only judge, as Mr. Chitty thinks, who put the case upon the true ground, rested his judgment wholly upon the delay in giving notice, by which the defendant's remedy against the indorsers was lost. See Chitty on Bills, ch. 9, p. 463, (8th ed.)

In *Wilkinson v. Johnson*, 3 B. & C. 435, the bill was paid for the honor of an indorser, whose name was forged; but the forgery was discovered on the same day, and notice being given, the money was recovered back. Lord TEXTERDEN, after examining the previous cases, and stating that a call upon the acceptor for payment was altogether a matter of course, while a call upon a person to pay for the honor of an indorser, was unusual, and necessarily imports that the name of the correspondent for whose honor the payment is asked,

is actually on the bill, proceeds to say:—"The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may be *reasonably lessened* by the assertion that the call makes upon him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet *where there is any fault in the other party, and that other party cannot be said to be wholly innocent*, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches." And he adds: "We think the payment in this case, was a payment by mistake, to a person not wholly free from blame, and who ought not, therefore, to retain the money."

Now, as it is undeniably clear, that a payment *supra protest*, either for the honor of a drawer or indorser, places the party paying in the same situation as payment by the drawee, (the party for whom payment is made being supposed to be his correspondent, with whose handwriting he is acquainted), it is evident that this decision was grounded upon the negligence of the holder, in not properly informing himself as to the genuineness of the signature, before presenting the bill to the correspondent of the indorser for payment; and the case is very strong to show with what scrupulous fidelity every duty devolved upon the holder must be discharged, to entitle him to retain the money received upon a forgery.¹

I shall refer to but one other English case, *Cocks v. Masterman*, 9 B. & C. 902. In that case, as in *Smith v. Mercer*, the payment was made by the bankers of a supposed acceptor, and the forgery was discovered and notice given the next day.² As there were indorsers

"There is nothing in the distinction made by the court in this case (*Wilkinson v. Johnston*) as to the difference between payment by payor for honor, and payment by ordinary drawee." *Ms. note of Mr. Ames.*

Where the holder of a note with a genuine endorsement of the payee, known to the holder as an accommodation endorser, accepted in discharge and payment of that note, when it became due, a second note made in the same way between the same parties, but on which the maker had forged the name of the payee, he (the holder) was permitted to recover against the payee on the first endorsement. *Allen v. Sharpe* (1871) 37 Ind. 67.

In *Stephenson v. Mount* (1867) 19 La. Ann. 295, the payor for honor, of a forged draft, was not allowed to recover.

See *Norton, Bills and Notes*, § 72; *Bigelow, Bills, Notes and Cheques*, 61 *et seq.*—Ed.

²"In respect to counterfeit bank notes, it is everywhere conceded that return

upon the paper, the court held the notice too late. While it is admitted that the holder had notice in time to have charged the other parties upon the bill, it is nevertheless said, that he had the right, if he saw fit, to take steps against them on the day it matured, and that he ought not to be deprived of this right by the negligence of the party making payment.

Amongst the American cases, those of *The Gloucester Bank v. The Salem Bank*, 17 Mass. R. 33, and *Bank of the United States v. The Bank of Georgia*, 10 Wheat. R. 333, were payments made upon forged notes, purporting to have been issued by the banks making payment. In the one case, a delay of fifteen days, and in the other of nineteen, had occurred in giving notice of the forgery to the banks receiving the money; and, in each, they were held entitled to retain it.

There can be no doubt of the correctness of the decisions. In neither case was the party receiving the money implicated in any fault; and while the decisions are based upon the analogy furnished by the rule, which fixes the rights of the drawee or acceptor of a bill, it is very successfully shown that, in reason, the rule has a much stronger application to the redemption of bank notes, growing out of the fact, that they purport to be the party's own paper, circulating as money, and therefore difficult to trace back, and from the greater facilities that a bank has to detect forgeries, by the use of registers and private marks.

In the first of these cases, Ch. J. PARKER commences his able opinion by laying down the general principle applicable to that and like

must be made promptly. In *Thomas v. Todd*, 6 Hill, 341, something less than two months was held too long. In *Raymond v. Baar*, 13 S. & R. 319, a delay of six months was pronounced gross negligence. In the *Gloucester Bank v. the Salem Bank*, 17, Mass. 32, a failure for fifteen days to examine a bundle of notes delivered to the plaintiff's cashier for exchange, was held to defeat the action. True, bank notes are created for currency, and the holder, as he scrutinizes them less, ought to repossess them soon to be able to start them on their way back. But this ground has not been found broad enough for giving them a peculiar place. In the case of a bill of exchange, the acceptor who pays and keeps his mouth shut for any time cannot recover. Why? Not so much that he, of all others, ought to have known who was drawing on him, as that his delay lets the intervening parties off by preventing the holder from notifying them in time; and therefore in the leading case of *Priece v. Neal*, 3 Burr. 1354, Lord MANSFIELD complained justly that the acceptor finds out the forgery when "the forger comes to be hanged." By the later decisions the law seems to be that if notice of the forgery be given on the very day on which a bill of exchange is paid, the acceptor may recover the money. 3 Barn. & Cress. 428; 9 Id. 902; 4 M. & Ry. 676. At some time, however, and in some way, there must be notice, and an offer to return before recovery of payment on any counterfeit instrument, note, bill, or bank note, paid or purchased. *Coolidge v. Bingham*, 1 Met. 547. In the *Bank of U. S. v. Bank of Georgia*, 10 Wheaton 333, Judge STORY's Review of the authorities up to 1825 was very unsuccessful,

cases. He says: "In all such cases, the just and sound principle of decision has been, that if the loss can be traced to the *fault or negligence of either party*, it shall be fixed upon him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it." And he very reasonably concludes, that "it would seem to be a principle of natural justice, that where a loss has happened he, through whose means it happened, should sustain it, although innocent, rather than he who is not only innocent, *but wholly without imputation of negligence.*"

In *Levy v. The Bank of the United States*, 4 Dall. R. 234, and *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Verm. R. 141, the payment was made upon a check, purporting to be drawn by a depositor upon the plaintiffs. In the first case, the forgery was detected and notice given on the same day, and in the other, not until after the expiration of two months; and in both, the right to retain the money was sustained. While the first case is certainly questionable, the last may have been correctly decided.

The *Canal Bank v. The Bank of Albany*, 1 Hill, 287, was the case of a forged indorsement of the payee, and the money paid by the drawees was recovered back; although the forgery was not discovered for two months after the payment, and the remedy against other indorsers was lost.

We do not cite this case as bearing directly upon the question under discussion, as it is well settled, that payment by the drawee does not involve an admission of the genuineness of the signature of any indorser¹; if it can be doubted that the time both for the notice and return is a reasonable time,"—*Rich v. Kelly* (1858) 30 Pa. St. 527, 530; and see note to *Hull v. Bank, infra*.—Ed.

¹See *Bobbett v. Pinkett* (1876) 1 Ex. Div. 368; *Indiana National Bank v. Hattschaw* (1884) 98 Ind. 85; *Buckley v. Second National Bank* (1872) 35 N. J. 400; *Kleinwort, Sons & Co. v. Comptoir National, etc.* [1894] 2 Q. B. 157; *Fine Art Society v. Union Bank* (1886) 17 Q. B. 705.

"Analogous to the forged endorsement cases are those where the defendant buys, under a forged power of attorney, a stock certificate, which he surrenders to the company and takes a new certificate in his own name. The title of the true owner is not affected. The defendant held the original certificate for the benefit of the true owner, and therefore he holds the new one as a constructive trustee for the true owner, and the company would be bound to issue a fresh certificate to the latter, but would then, of course, be entitled to have the second certificate delivered up. The loss would fall on the innocent purchaser. *Metropolitan Savings Bank v. Mayor* (1884) 63 Md. 6; *Simm v. Anglo-American Telegraph Co.* (1879) L. R. 5, Q. B. D. 188. The case of *Boston, etc., R. R. Co. v. Richardson* (1883) 135 Mass. 273, went too far in charging the innocent purchaser as a warrantor. If, again, the innocent purchaser had paid his money on the strength of the new certificate, the company would be estopped, as in *Brown, Lancaster & Co. v. Howard Fire Ins. Co.* (1875) 42 Md. 384. *Hambleton v. R. R. Co.* (1876) 44 Md. 551; *Metropolitan Savings Bank v. Mayor*,

and the rule has even been carried so far, as to be applied to the case of a bill payable to the order of the drawer, and purporting to be indorsed by him. Story on Bills, sec. 412. But the case is valuable for the general rule elicited by the court, upon a full review of all the cases we have cited, that "money paid by one party to another through a mutual mistake of facts, *in respect to which both were equally bound to inquire*, may be recovered back;" and that when money is thus paid upon a forgery, it is sufficient to give notice, without unreasonable delay, after the forgery is discovered.

In the case of the Bank of Commerce v. The Union Bank, 3 Com. R. 230, the forgery consisted in increasing the amount by altering the body of the bill; and the drawees recovered back the money,¹ although a notice was given too late to enable the holder to charge the indorsers. Judge RUGGLES, in delivering the opinion of the court, after stating that the rule which casts the loss upon the drawee, when the drawer's name is forged, "is founded on the supposed *negligence* of the drawee in failing, by an examination of the signature, when the bill is presented, to detect the forgery and refuse payment;" and that the rule did not apply to an alteration in the body of the bill, which was not presumed to be in a handwriting known to him, arrives at the conclusion, that "the greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery," and that, "if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require."

In Goddard v. The Merchants' Bank, 4 Com. R. 147, the signature of the drawer was forged, and the bill was paid the day after it was protested by the plaintiff, for the honor of the drawer. The bill purported to have been drawn by a bank in Ohio, upon the American Exchange Bank in New York, and was indorsed by the person who

supra; Simm v. Anglo-Am. Tile Co., *supra*. Boston, etc., R. R. Co. v. Richardson, *supra*. Cf. Bishop v. Balkis Consolidated Co. (1890) 25 Q. B. D. 77." Ms. note of Mr. Ames to Canal Bank v. Bank of Albany.—Ed.

¹See Merchants' Bank v. Exchange Bank (1840) 16 La. 457. Where a teller certified a raised check, saying it was right "in every particular," the bank was permitted to recover. Security Bank v. National Bank (1876) 67 N. Y. 458; followed in Clews *et al.* v. Bank of New York (1882) 89 N. Y. 418. But the latter was distinguished and restricted in Clews *et al.* v. Bank of New York (1887) 105 N. Y. 398, *semble*, by refusing a recovery if by custom the teller was in such cases given power to bind absolutely. In Parke v. Roser (1879) 67 Ind. 500, the court stated that the certification of a check by a bank amounts only to an agreement that the signature of the drawer is genuine, and that he has sufficient funds to meet it. Accord, Irving Bank v. Wetherald (1867) 36 N. Y. 335. In U. S. National Bank v. National Park Bank (1891) 13 N. Y. Supp. 411, 412, it is said that "in order to absolve an agent who is simply an agent for collection he must actually part with the money; he must pay over

forged it to the Bank of Rutland, Vt., by which it was transmitted to the defendants for collection. In consequence of the absence of the notary, in whose hands it was placed, from his office, the plaintiff did not see the bill at the time he made the payment, but left word to have it sent to his place of business. On seeing it the next day, he pronounced it a forgery and demanded back the money. The court held him entitled to recover.¹ They admit that he occupied the same position as the drawee would; but as he paid the bill without an opportunity of judging whether it was signed by his correspondents or not, and upon the representation of the holders that they had such a bill, that he could not be held to have admitted the genuineness of the signature. And, although the forgery was discovered too late to give notice of protest, they held that no such notice was necessary, as the defendants had the bill only for collection and needed no recourse, and the payee who forged it was liable to the owners without notice.

We have thus particularly referred to every important case, in England and the United States, having a direct reference to the subject under examination, and to the grounds upon which these decisions have been made. It is readily admitted, that no one of them is, in all respects, like the present. The governing principles by which these cases were ruled, rather than precise identity of circumstances, must furnish a guide for us. Several questions will readily suggest themselves, which we do not consider necessarily involved in the decision of this case. Amongst these is the question, whether, in cases properly within the rule, of payment by the drawee of a bill or other party occupying a like position, the payment becomes absolute as soon as made; or whether a discovery of the forgery, and notice given in time to charge the real parties upon it, will entitle him to a return of the money? The cases cited from the Massachusetts and Wheaton's Reports, pretty strongly imply that, in the case of bank notes, the payment is absolute; and Mr. Justice STORY, in his Treatise on Bills, is evidently of the opinion, that the same rule is applicable to the

the proceeds to his principal. It is not sufficient to credit the same in account," citing *Bank of Commerce v. Union Bank* (1850) 3 N. Y. 236; *National Park Bank v. Seaboard Bank* (1889) 114 N. Y. 28.

See elaborate note, with citations of authorities, 17 Am. St. Rep. 896.—Ed.

"If this court hold the ruling of that case [*Goddard v. Merchants' Bank*, *supra*] correct . . . the appellant here must recover, as the case there reported seems to be entirely analagous to the one at bar. But with the highest difference to the opinion of that court, we think its ruling in that case cannot be sustained upon principle, nor by the authorities in analagous cases. . . . The premises assumed appear to be unsound, and the conclusions drawn from them cannot therefore be sustained." *Bernheimer v. Marshall & Co.* (1858) 2 Minn. 78. See also *contra* *Leather v. Simpson* (1871) L. R. 11 Equity 398. *Johnston v. Commercial Bank* (1885) 27 W. Va. 343—Printed post.—Ed.

payment of bills and checks. For myself, I must be permitted to say, that I can see very little foundation in principle for this opinion. The ground upon which the drawee is denied the right to correct the mistake originating in his own negligence, is the prejudice arising to the holder from making payment instead of suffering the paper to be protested. I do not say this prejudice must be affirmatively proved; the law may, in many cases, presume it. But where the only prejudice which the party could sustain would be the loss of remedies against other parties, and when the law by its own fixed rules determines that those remedies remain unimpaired, I think no such presumption can arise. And such is not only the opinion of Mr. Chitty, but he thinks it the fair result of the modern English cases. After alluding to the grounds of the contrary opinion, he says: "But, on the other hand, it may be observed, that the holder who obtained payment, cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made; and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that of late, upon questions of this nature, these latter considerations have influenced the court in determining, whether or not the money shall be recoverable back." To this may be added, the repeatedly expressed opinion of the courts of New York.

We pass without any remark, or the expression of any opinion, the claim of the plaintiffs, that, as the defendants were confessedly liable, under the custom, to return the money for one day, as there were no parties upon the paper to be made liable by notice of nonpayment, and as the money was irrecoverably gone before the check was presented, unless recovered from the forger, whose liability still continues, the failure to give notice until the forgery was discovered, did not, in presumption of law, prejudice the defendants, and that it could only operate against the plaintiffs when it was shown that actual loss ensued; and, for the purposes of the case, we yield to the defendants the position, that, after the expiration of that day, and after the plaintiffs had the opportunity to examine the signature, they stood upon the same ground as though they had paid on sight of the check. We do not examine these propositions, because we think the case now depends upon much more obvious considerations.

Recurring again to the fact, that the plaintiffs gave evidence

tending to establish a course of business, which required the defendants to take the first precautionary step for the detection of the forgery, which they wholly omitted to do, we proceed to apply the principles, deducible from the cases referred to, to that attitude of the controversy. Viewed in that light, the case is most clearly within the principle upon which *Wilkinson v. Johnson* was decided. In that case, in consequence of the relation of the parties, it became the duty of the holder to exercise active diligence to ascertain the genuineness of the bill. In this case, a like obligation arose from the course of business between the parties. In this case, as in that, the attention of the plaintiffs might be "reasonably lessened," under the supposition that this obligation had been regarded. And while it is true, here as there, that the plaintiffs ought to have satisfied themselves of the genuineness of the check before making payment, yet the fault "was not wholly and entirely their own, but began, at least," with the defendants; and the payment was made, not only "to a person not wholly free from blame," but to one grievously in fault.

Quite as clearly is it within the rule of Chief Justice PARKER, requiring the loss to fall upon the party to whose "fault or negligence" it can be traced, and that of the supreme court of New York, affirming the general proposition, that where the parties are equally innocent, or equally in fault, and money is paid upon a mutual mistake of facts, "in respect to which both were equally bound to inquire," it may be recovered back. In this case, there is every reason to believe, that if the defendants had required the person presenting the check to show who he was, he would have declined the ordeal, and it would not have been bought or paid. The loss may, therefore, be traced directly to their negligence. But whether this would have prevented the fraud or not, it is enough that both parties were bound to inquire, and, allowing both to be in fault, the result is precisely the same. The case of *Goddard v. The Merchants' Bank*, is full to the purpose; that, in order to bring the drawee within the exception to the rule, which allows money paid under a mistake of facts to be recovered back, the whole responsibility of investigating must be cast upon him by the holder, and, as between them, he must be left in possession of every effective means of prosecuting the inquiry. If the holder does not see fit to require this, or takes any part of the duty upon himself, or deprives the drawee of any of these means of information, the case, in the language of C. J. BRONSON, "is out of the exception, and within the general rule." And in all cases within the general rule, all the New York cases affirm it is sufficient to give notice when the forgery is discovered.

To entitle the holder to retain money obtained by mistake, upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert, that he put the whole responsibility upon the drawee, and relied

upon him to decide, and that the mistake arising from his negligence, cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and, especially, if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with a good conscience retain it. To allow him to do so, would be to permit him to take advantage of his own wrong, and to pervert a rule, designed for his protection against the negligence of the drawee, into one for doing injustice to him.

Nor is it anything remarkable or unusual that such an obligation should arise, from a settled course of business between the parties, or be established by the proof of a custom; or that the holder should, for his negligent failure to regard it, be deprived of rights which he would otherwise be entitled to demand. No court has been more reluctant than this to allow local customs to interfere with the general principles of law; but to a certain extent, and within certain limits, it becomes absolutely necessary to enforce them, or to disregard the implied conditions and understandings upon which parties have dealt. To allow them to operate against third persons, who cannot be shown to have had any knowledge of their existence, is one thing; and to hold the immediate parties to the controversy, bound by a course of business upon which they have uniformly acted, or one embarked in a particular business, at a place where it has been found necessary to its safe or convenient prosecution, that a general custom should be observed, under obligations to conform to it, is quite another. Every one engaged in a business, undertakes to bring to it a competent knowledge of its rules and principles; and those who deal with him, have a right to rely upon his having regarded them.

The custom which the plaintiff sought to establish, seems to have been one of the most reasonable character. It is a great error to suppose, that the drawee of a bill or check is bound to rely alone on his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution, is that of requiring the holder to furnish some reliable information of himself, and of his right to the paper. But when another bank intervenes and takes the check, this cannot be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution. While the bank taking the check, by its exercise, is consulting its own security, as well as that of the bank upon which

it purports to be drawn, it gets a full remuneration for its care, in the reciprocity afforded in relation to checks drawn upon itself, and taken in like manner.

When the defendants purchased this check, they knew full well that it deprived the plaintiffs of the ability to make this part of the investigation, and that it would be paid to them without any examination whatever; and, if the custom really exists, they must have known equally well that, in afterwards passing upon the genuineness of the paper, the plaintiffs would have a right to rely, as an important element in forming a conclusion, upon the supposition that the defendants had made the investigation, and were satisfied with the result. And, while it may be very true, that they did not warrant the genuineness of the checks, in the package which they presented for payment; yet, in the event supposed, they did what was equivalent to affirming—that they had checks for the amount they asked, received from persons either known to them, or of whose identity and honesty they were satisfactorily informed.

But the short answer to all this, made by counsel for the defendants, and adopted in the superior court, is, that negligence alone, however gross, and however injurious to the plaintiffs, cannot affect the defendants; that unless they “have been proved to be complicated with the *fraud* by which the plaintiffs have suffered, they cannot be held to refund the amount that has been paid to them.” And they very correctly say, that there was no proof of any such fraud or complicity in the forgery. This position is grounded upon the authority of several recent English decisions, in relation to the proof necessary to impeach the *title* of a holder of negotiable paper, in conflict with many earlier cases in that country.

Gill v. Cubitt, 3 B. & C. 466, was the case of an accepted bill, which had been stolen, and was afterwards discounted by the plaintiff (a broker) without knowing the name of the holder, though his features seemed familiar, and without asking any questions as to his right to the bill. C. J. ANBOTT left to the jury the question, “whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent and careful man?” and he put to them this very significant inquiry, what they would think of a sign like this:—“*Bills discounted for persons whose features are familiar, and no questions asked.*” The defendant had a verdict, and the court refused to disturb it. This decision was followed in several subsequent cases; until at length, in Crook v. Jadis, 5 B. & Ad. 911, which was also the case of an accepted bill, fraudulently put in circulation, Lord DENMAN told the jury to find for the plaintiff, “if they thought he had not been guilty of *gross negligence* in taking the bill;” and his ruling was sustained by the whole court. This case, again, governed several others; until, in Goodman v. Harvey, 4 Ad. & Ell. 870, Lord DENMAN and his associates took another step, and held,

that "gross negligence only could not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing." And they add:—"We have shaken off the last remnant of the contrary doctrine."

It is not a little remarkable, if these cases can properly have so commanding an influence upon the question before us, that they should not have been alluded to, either by the court or counsel, in any of the cases to which we have referred. They present an important question, and, when it shall properly arise, one which will deserve careful attention; but, in the decision of this case, we regard it alike immaterial, whether the rule of Lord TENTERDEN, or the first impression, or "sober second thought" of Lord DENMAN, is adopted. They were all actions brought upon genuine bills, either stolen, lost, or fraudulently negotiated; and the rule which governed them all, has its foundation in that public policy which fosters the circulation of bills, as a medium of exchange, answering the purposes of currency. But the law has shown no such anxiety to facilitate the circulation of forgeries. On the contrary, however innocent and careful the holder may have been, if he is obliged to trace his title through a forgery, the instrument is a nullity in his hands. Before any encomiums can properly be passed upon the peculiar and happy adaptation of the bill of exchange for circulation, or any foundation can be laid for insisting that the title of the holder shall not be affected by anything that may have attended its private history before reaching his hands,—a bill must exist, of which *title* may be predicated, and to which such considerations may be referred. We do not say that every name appearing upon it must be genuine: but there must at least, either at its inception, or coming upon it afterwards and impliedly warranting the previous signatures, be some one liable to pay it before it acquires the character of a bill, in any respect or for any purpose. The rule insisted upon, is a rule alone applicable to the protection of *legal titles*, and to the instruments by which such titles may be acquired, and to no other. What title did the defendants get when they took the paper appearing in this case? Certainly, none. It was as perfect a nullity as though no word had been written upon it. No one appeared to be liable upon it but the drawers, and their names were forged. Even the felon, although liable for his fraud, was not liable as a party to the paper. With exactly the same propriety could a plea of purchase, for a valuable consideration without notice, be sustained upon a forged deed, as this rule applied to a paper of that description.

If the defendants are entitled to retain the money, it is upon a different principle, resting upon different considerations, and with other and different objects. Confessing the nullity of the paper as a muniment of title, they must stand upon their interest, to know

it at the earliest moment, and their right to exact the information from the plaintiffs, when it was presented for payment. The negligent omission of the plaintiffs to discharge this duty, resulting in injury to the defendants, lies at the very foundation of the rule, which subjects them to the loss and allows the defendants to retain the money. But it would indeed be singular, if the one party could be visited with consequences so severe, upon the mere legal imputation of negligence and injury, and the other stand wholly unaffected for their negligence, however gross and injurious it might have been. As was said, in the *Bank of Commerce v. The Union Bank*, "the plaintiffs' right of recovery rests on equitable grounds;" and, in our opinion, they place themselves upon the highest equitable ground for a return of the money, when they show that it was theirs, that they parted with it by mistake, and without consideration, upon a forged instrument which the defendants, by their negligent disregard of duty, had contributed to induce them to act upon, as genuine. In the forum of conscience, it is true, there may be a wide difference between intentional injuries and those arising from negligence. But no man operates quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life, rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception.

The necessity for care and caution on the part of those who use bills and checks, to prevent injury to those upon whom they are drawn, is strikingly illustrated in another class of cases, which turned upon a principle very analogous to the one that we have applied to this. As a general proposition, it is perfectly well settled, that payment upon a forged check or order cannot be charged by the party paying, against the party purporting to have drawn the paper; but the latter will be entitled to recover the money intrusted to the former, however innocently or with whatever caution the payment may have been made. *Hall v. Fuller*, 5 B. & C. 750; *Johnson v. Windle*, 3 Bing. N. C. 225; *Roberts v. Tucker*, 12 Q. B. 560.

But yet, in *Young v. Grote*, 4 Bing. 253, where the customer had entrusted his wife to fill up checks in his absence, and this had been so inartificially and carelessly done, as to be easily changed from £50 to £350, the banker was held entitled to a credit for the larger sum. In the very recent case of *Orr v. The Union Bank of Scotland*, in the house of lords (29 Eng. Law & Eq. Rep. 1), Lord Chancellor CRANWORTH, in speaking of the general rule, and of the exception engrafted upon it by this case, says: "The decision went on the

ground that it was the fault of the customer; the bank had been deceived. The principle is a sound one, that when the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine."

We have thus, at much greater length than was intended at the outset, stated our views of this case. We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery, when some one must suffer by the mistake. But we must be better informed than at present, before we shall be able to perceive the justice or propriety of permitting a holder to profit by a mistake which his own negligent disregard of duty has contributed to induce the drawee to commit.

Should the plaintiffs be ultimately able to satisfy a jury of the state of facts which their evidence before conducted to prove, they would, in our opinion, have established a clear right to recover.

Judgment reversed and cause remanded.

THURMAN, C. J., and SWAN, J., dissented.¹

IN *Hardy & Bros. v. Chesapeake Bank* (1879) 51 Md. 562, 585, ALVEY, J., delivering the opinion of the Court, said:

"1. It is now perfectly well settled, that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor; and that when the bank receives the money as an ordinary deposit and gives credit to the depositor, the money becomes the funds of the bank, and may be used by it as any other funds to which it may be entitled. It is accountable for the deposits that it may receive

"To the same effect, *Nat. Bank v. Bangs*, 106 Mass. 441; *Danvers Bank v. Salem Bank*, 151 Mass. 280; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rouvant v. San Antonio Bank*, 63 Tex. 610. The French law is the same. 2 Pardessus, *Cours de Droit Comm.* (3 ed.), § 505; 2 Bédarride, *Lettre de Change* (2 ed.), § 377.

"But see contra, *Howard v. Mississippi Bank*, 28 La. Ann. 727; *Comm. Bank v. First Bank*, 30 Md. 11; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *St. Albans' Bank v. Farmers' Bank*, 10 Vt. 141. It would not be surprising if these last four cases should not be followed even in the jurisdictions in which they were decided." Ames, "*The Doctrine of Price v. Neal*," *supra*.

Of course, while drawee must know drawer's signature, if the drawee is misled by the bad faith or negligence of the holder, he may recover from the holder. *First National Bank v. Richer* (1874) 71 Ill. 439. Bigelow, *Bills, Notes and Cheques*, 225.—Ed.

as debtor, and in respect to ordinary deposits there is an implied agreement between the bank and the depositor that the checks of the latter will be honored to the extent of the funds standing to his credit. *Horwitz v. Ellinger*, 31 Md. 492, 503; *Foley v. Hill*, 2 C. & Fin. 28; *Thompson v. Riggs*, 5 Wall. 663; *Bank of the Republic v. Millard*, 10 Wall. 152, 155. There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril, and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained, that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril. *Com. & Farm. Nat. Bank v. First Nat. Bank*, 30 Md. 11. No right or title can be legally claimed through a forgery; and the possession by the bank of a forged check upon which money has been paid, affords of itself no ground for claim of credit in account as against the party whose name has been forged."¹

JOHNSTON v. COMMERCIAL BANK.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1885.

[27 *West Virginia*, 343.]

JOHNSON, President. On September 3, 1884, B. R. Johnston brought in the municipal court of Wheeling an action of trespass on the case in *assumpsit* against the Commercial Bank of Wheeling, to recover the amount of a note, \$225.00, which was purported to have

¹See *First National Bank v. Vost* (1890) 11 N. Y. Supp. 862; *Robinson v. Yarrow* (1817) 7 Taunt. 455.

But a bank, paying upon a forged endorsement, may recover from the one to whom the money is paid. *Leather Manufacturers' Bank v. Merchants' Bank* (1888) 128 U. S. 26, printed post; even if the endorsement is that of the drawer, provided the forged name appeared as an endorsement only, notwithstanding delay in discovering the forgery. *Ryan v. Bank of Montreal* (1886) 12 Ont. 39; and it would seem that an irrevocable change of position of the one paid is no defence. *Corn Exchange Bank v. Nassau Bank* (1883) 91 N. Y. 74. But a banker is not held to a knowledge of the signature of a drawer, a depositor, when he discounts the bill. *Fuller v. Smith* (1824) 1 C. & P. 197.

"The liability of the banker, however, for a loss occasioned by neglect, to exercise such vigilance, is confined to the maker alone. So far as other parties through whose hands an altered check passes are concerned, they have the same

been signed by said B. R. Johnston, payable to the order of Philip Metzner, and negotiated by said bank, and after maturity paid by said supposed maker, who afterwards discovered that his signature thereto was a forgery. The declaration contained the common counts in *assumpsit*, no special count.

The defendant demurred to the declaration, which demurrer was overruled, and the defendant pleaded *non-assumpsit*. The case was tried before a jury and verdict was rendered for the plaintiff. The defendant moved to set aside the verdict and grant it a new trial, which motion was overruled, and judgment was entered on the verdict. The defendant took a bill of exceptions to certain rulings of the court, which bill certifies all the evidence in the case.¹

Under these circumstances can the defendant, the Commercial Bank, be required by law to pay back the money so paid on said forged note?

The leading case on the subject, so regarded in all the books, is *Price v. Neal*, decided in 1762, 3 Burr. 1354. It was an action on the case brought by Price against Neal, wherein Price declares that the defendant, Neal, was indebted to him to £80 for money had and received to his, plaintiff's, use, and damages were laid at £100. It was proved at the trial, that a bill was drawn as follows:²

In *Smith v. Mercer*, 6 Taunt. 76 (1 E. C. L. 312), the defendant took a bill accepted payable at the plaintiffs', who were the drawer's bankers and endorsed it to their, the defendants', agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprized them, that the acceptance was forged. It was held by three judges, DALLAS, HEATH and GIBBS, C. J., against CHAMBRE, J., that the plaintiffs could not recover from

opportunity for detecting fraudulent alterations in the body of the check that the banker has, and as to them, after payment, he is responsible only for the genuineness of the maker's signature. *Bank of Commerce v. Union Bank*, 3 N. Y. 230. The principle stated in *White v. Continental Bank*, 64 N. Y. 316; *Marine National Bank v. National City Bank*, 59 N. Y. 67, and kindred cases, that the drawees of a check or bill are held to a knowledge of the signature only of their correspondents, the drawers, and not for a want of genuineness of the body of the instrument, applies only between them and such other parties as have equal opportunity of inspection, and equal means for determining the existence of an alteration. Such parties take the paper relying solely upon the reputed responsibility of their transferors and the other parties to it, and its apparent genuineness, and they therefore deal in it at their peril. They have no duty to perform in respect to it except that of guarding their own interests, and in buying and transferring it to others they take the risk of loss occurring from fraudulent alterations."—*Crawford v. West Side Bank* (1885) 100 N. Y. 50, 54.—ED.

¹A part of the opinion giving details of the transaction, matters of evidence and jury charges refused, has been omitted.—ED.

²The learned Court here quoted *in extenso* from *Price v. Neal*, *ante*.—ED.

the defendants the amount which they had thus paid them on the forged acceptance. DALLAS, J., said: "And though the facts are not precisely the same, I think the case of *Price v. Neal*, 3 Burr. 1354, and 1 Bl. 390, furnishes a rule, which ought to govern the present." GIBBS, C. J., said: "A narrow and particular ground is with me conclusive in this case. If the acceptance had been genuine and the plaintiffs had refused payment, the defendants had their remedy against the supposed acceptor; or if they failed to obtain the amount from him, they had their remedy against the prior parties on the bill. The acceptance carried with it an order on the bankers of the supposed acceptor to pay the money. It purported to be an order of *Evans*, whose banker the plaintiffs were. It was incumbent on them to see to the reality of that order before they obeyed it, and if by obeying it they are the sufferers, they ought not to throw on another a loss occurring without fault of his. See the circumstances: The defendants present the bill for payment, and it is paid to them. The money remained in their hands, without demand made on them for it, from the 23d of April till the 30th of April; the forgery being then discovered the plaintiffs demand it back from the defendants. If the plaintiffs had originally refused to pay this money, the holder would immediately have given notice to the drawer and to the immediate indorser which would have been transmitted to the first indorser and drawer. In consequence of the bill being paid the defendants continued to have the money in their hands till the 30th of April. I think it was then too late for the defendants to give notice to the prior parties, and by not having given such notice they lost their remedy against those parties. . . . I have put the case on the express point that by the acts of the plaintiffs the defendants are put in a worse situation; but I do not mean thereby to express my dissent from the larger ground on which the case has been put by my brothers HEATH and DALLAS; but I think the ground on which I have put it is alone a sufficient answer to all the arguments that have been used."

CHAMBRE, J., in his dissenting opinion, said: "The situation of the plaintiffs is extremely material. They are no parties to this bill, neither drawees, acceptees or payees. They are not purchasers of the bill; they never had any property in it; they are mere servants and agents of the payees; it is as to them, a payment under a supposed authority which does not exist."

In *Mather v. Maidstone*, 37 Eng. L. & Eq. 339, JERVIS, C. J., said: "As a general rule the holder of a bill of exchange is entitled to know whether the acceptance is genuine and whether it will be paid by the acceptor. If the acceptor pays it, he cannot afterwards recover the money back, if he has, at the time he pays it, the means of satisfying himself of his liability to pay it, even though it should turn out that the acceptance is a forgery. Here instead of paying money for the

bill, the acceptor gave another bill, but I think that can make no difference. . . . The defendant, after the bill had come into his hands, and after he had had an ample opportunity of inspecting it, kept it and gave a fresh bill at three months; and after an interval of one month, he discovered that the acceptance of the original bill was a forgery, and he said that he was not liable on it, and offered to return it, so as to put the plaintiff in the same condition, as he was in, a month before, the plaintiff having been all that period deprived of his remedy against the other parties liable on the bill. Under these circumstances the defendant cannot be allowed now to say the acceptance was not in his handwriting." See *Levy v. Bank of the United States*, 4 Dallas, 234.

In *U. S. Bank v. Bank of Georgia*, 10 Wheat. 33, it was decided that in general a payment received on forged papers or in base coin is not good; and if there be no negligence in the party, he may recover back the consideration paid for them or sue upon his original demand; but that this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash and afterwards discovered to be counterfeit; that in case of such a payment on general account an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account. Mr. Justice STORY in delivering the opinion of the court, affirms the decision of *Price v. Neal*, *supra*, and says: "The case of *Neal v. Price* has never since been departed from, and in all the subsequent decisions, in which it has been cited, it had the uniform support of the court and has been deemed a satisfactory authority." The Court in this case also approved the decision in *Gloucester Bank v. The Salem Bank*, 17 Mass. 33, and approvingly quotes the following from PARKER, chief justice, in that case:

"The true rule is that the party receiving such notes, must examine them as soon as he has opportunity, and return them immediately. If he does not he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength, when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not, and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." Referring to the case from 17 Mass. and *Price v. Neal*, and other authorities by him cited, Mr. Justice STORY says: "Against the pressure of these authorities there is not a single opposing case; and we must therefore conclude that both in England and America, the question has been supposed to be at rest."

In *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 145, the court, by PHELPS, judge, said: "The case of *Price v. Neal* is now

understood to have proceeded upon the ground, that the drawee is bound to know the handwriting of his correspondent, and thus understood, its authority has never been questioned. It has often been commented on both in the English courts and those of this country, and although its applicability to a transfer of a forged security between persons not parties to it has been questioned, yet its authority as applied to the case of such a bill, accepted or paid by the drawee, has been uniformly and fully sustained. That the rule thus adopted extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards circulated, appears not only from the case itself but from subsequent decisions, in which the case itself has been approved and its principle adopted. There is good reason for the declaration, upon which the authority of that case rests, to be found in the intrinsic character of the transaction itself. The presentment of a bill to the drawee, is a direct appeal to him to sanction or repudiate it. It is an inquiry as to its genuineness addressed to the party, who of all men is supposed to be best able to answer it, and whose decision is most satisfactory. He is moreover the person, to whom the bill points, as the legitimate source of information to others; and if he were permitted to dishonor a bill, after once having honored it, the very foundation of confidence in commercial paper would be shaken. There is a wide difference between such a transaction and the passing of paper as a representative of money between persons equally strangers to it in the ordinary course of business. In the latter case the receiver relies in a measure upon the paper, while in the former the case is reversed, and the holder relies and has a right to rely upon the decision of him, to whom the bill is addressed, and who alone is to determine whether it shall be honored or not."

In *Ellis & Morton v. Ins. and Trust Co.*, 4 Ohio St. 628, it was held by a majority of the court, that money paid upon a mistake of facts, and without consideration, may as a general rule be recovered back; that a well settled exception of this rule occurs, when the payment is made by the drawee of a forged bill or check to a holder for value without fault, and the money cannot be returned without prejudice to him; that the exception rests upon the supposed acquaintance of the drawee with the drawer's signature, and the negligence imputed to him for paying the paper, without sufficient inquiry as to its genuineness; that this exception does not apply, when either by express agreement or a settled course of business between the parties or by a general custom in the place applicable to the business, in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud and by his negligent failure to perform it has contributed to induce the payee to act upon the paper as genuine and to advance the money upon it; nor does it apply in any case, where the parties are in a mutual fault, or where the money is paid upon a mistake of facts, in respect to which

both were bound to inquire; that in a case of money paid upon a forgery not falling within the exception, but being governed by the general rule it is sufficient to give notice, when the forgery is discovered. THURMAN, chief justice, and SWAN, judge, dissent from the decision. RANNEY, judge, in delivering the opinion of the majority of the court, said on page 652:

"We admit it to be equally well settled, that, where the instrument is drawn upon, or purports to be signed by, the party paying the money, to a holder without default, and whose situation would thereby be changed to his prejudice, if he were compelled to refund, the money cannot be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting, in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law therefore allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him negligence, and as between him and the innocent holder compels him to suffer the loss."

In *Commercial and Farmers' National Bank v. First National Bank*, 30 Md. 11, the authority of *Price v. Neal* is cited and approved.

In *National Park Bank of New York v. Ninth National Bank*, 46 N. Y. 77, the complaint stated that on March 25, 1867, the Ridgely National Bank of Springfield, Illinois, drew its draft or bill of exchange on plaintiff for the sum of \$14.20 payable to the order of Eli Shirley and delivered the same to the payee; that afterward the amount of said draft was fraudulently changed to \$6,300.00, and the name of the payee to E. G. Fanchon, Esq.; that the name of William Ridgely, cashier, signed to said draft was erased and afterwards rewritten by the person making the erasure; that the same was then discounted by the Lexington National Bank and by it was endorsed to defendant; that afterward and on or about April 12, 1867, defendant presented said draft to plaintiff, and said plaintiff paid thereon the sum of \$6,300; that plaintiff discovered the forgery May 10, 1867, and forthwith notified the defendant thereof and demanded repayment of said sum less \$14.20, which was refused. Defendant demurred and for ground stated, that complainant did not state a cause of action. The court below overruled the demurrer. ALLEN, judge, in pronouncing the unanimous opinion of the court, said on page 80:

"For more than a century it has been held and decided, without question, that it is incumbent on the drawee of a bill to be satisfied that the signature of the drawer is genuine; that he is presumed to know the handwriting of his correspondent, if he accepts or pays a bill to which the drawer's name had been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid."

He then refers to and approves *Price v. Neal*, and subsequent decisions, affirming the same doctrine, and further says:

"Cases have been distinguished from *Price v. Neal*, and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of endorsements or handwriting of parties to negotiable instruments other than the drawers. But as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid. . . . A rule so well established and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded. It has become a rule of right and of action among commercial and business men, and any interference with it would be mischievous. Judge RUGGLES in *Goddard v. Merchants' Bank*, *supra*, well says: 'It should not be departed from or fritted away by exceptions resting on slight grounds, and cannot be overruled, without overthrowing valuable and well-settled principles of commercial law.'"

The judgment of the court below was reversed, and judgment entered for defendant. The opinion of RUGGLES, J., in *Goddard v. Merchants' Bank*, 4 Comstock, 149, referred to by Judge ALLEN was a dissenting opinion from the majority of the court, who he evidently thought were in that case, "frittering away" by an exception to the general rule, and thus overthrowing "valuable and well-settled principles of commercial law." To the same effect is *Stout v. Bennett*, 39 Mo. 277; *Young & Son v. Lehmon, Darr & Co.*, 63 Ala. 519; *Bernheimer v. Marshall & Co.*, 2 Minn. 78, and *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181. I will now refer to some cases cited by counsel for plaintiff, the defendant in error.

The case of *Goddard v. Merchants' Bank*, *supra*, was a case in which it appeared that a forged bill purporting to be drawn by a bank in Ohio was presented to the drawees in New York and payment refused on *Saturday* for want of funds of the drawer. On *Monday* following the plaintiff on being informed of the matter, called at the office of the notary, who had the bill for protest and notice, and left his check for the amount in order to take up the bill for the honor of the drawers. In consequence of the absence of the notary from his office he did not see the bill, but left word to have it sent to his place of business. The notary on the same day delivered the check over to the holder of the bill but did not send the bill to the plaintiff. The plaintiff called again the next day at the office of the notary and on being shown the bill ascertained and pronounced it to be a forgery. It was held by a majority of the court, RUGGLES, Judge, and JEWETT, Judge, dissenting, that under the circumstances the plaintiff was not chargeable with negligence, and that he was entitled to recover the

money he had paid on the ground of mistake. To the same effect is *Canal Bank v. Bank of Albany*, 1 Hill, 287.

The case of *Lawrence et al. v. American National Bank*, 54 N. Y. 432, only lays down the general rule, that money paid under mistake of fact may be recovered back. That this is the general rule is nowhere doubted.

In *National Bank of Commerce v. Banking Association*, 55 N. Y. 211, it is held that a bank is not bound to know the handwriting or genuineness of the filling up of a check drawn upon and paid by it. It is legally concluded only as to the signature of the drawer and its own certification; therefore, when a bank has paid by mistake to a *bona fide* holder of a certified check, which after certification had been fraudulently altered by raising the amount, it can recover back the amount thus paid, unless such holder has suffered loss in consequence of the mistake. It is also held in this case that a mistake in recognizing a forged instrument as genuine is binding only when the forgery is such that it ought to have been discovered by a bare inspection of the instrument without reference to anything outside of it, not even to the memory of the party as to the obligations he had issued. This decision approves *Price v. Neal* and the case in 46 N. Y. *supra*.

Mayer v. Mayer, 63 N. Y. 455, is an ordinary case of paying money under mistake of fact.

In *First National Bank of Quincy v. Ricker*, 71 Ill. 439, the exception to the general rule is recognized that the drawee of a check is presumed to know the signature of the drawer, and if the drawee pays a forged check to the holder he will not be entitled to recover back the money so paid, where there has been no fraud practiced upon him. But it was held that the drawee or payor of a forged bank-check can recover back the amount paid by him on it, when the holder or payee is himself at fault or has been guilty of fraudulent practices, which may have thrown the drawee off his guard.

Welch v. Goodwin, 123 Mass. 71, seems to have been decided without much consideration, and virtually overruled *Gloucester Bank v. Salem Bank*, 17 Mass. 33, without noticing it and without referring to one of the many authorities we have cited. LORD, Judge, said:

"The question which we are called upon to decide is, whether under any circumstances, a party may recover back money upon a security being a forged signature of himself, supposing it at the time of payment to be his genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake whether arising from natural or temporary infirmity, or otherwise made without fault on his part, entitles him to the same relief. How far this right would be affected by neglect on his part to give prompt notice of the mistake

or by any change affecting the situation or the rights of the persons to whom the payment is made we are not called upon to consider. Here notice was given immediately upon discovering the forgery. Whatever securities were given up by the defendant in consideration of the receipt of the forged note had been given up before the payment was made."

It seems to us from the review of the authorities, that it is a rule of commercial law too firmly established to be shaken, being sustained by an unbroken line of authorities for more than a century, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and *a fortiori* the maker of a negotiable note is presumed to know his own signature, and if the drawee accepts or pays the bill, or the maker pays the negotiable note, in the hands of a *bona fide* holder, to which the drawer's or maker's name has been forged, he is bound by the act and cannot recover back the money so paid. It is essential to the business interests of the country, that there shall be certainty in commercial transactions; that the mercantile law shall be firm and stable, never varying, so that those who deal in commercial paper may know what their rights are. Of course a drawee or maker of commercial paper may by the exercise of due care protect himself against losses by forgery, and if he pays such paper, the law imputes to him negligence in so doing, and he cannot after such payment throw the loss upon the holder of such paper. But it is said the holder of such paper should not be permitted to hold the money so paid, unless he has been placed in a worse situation thereby and has suffered actual loss; under such circumstances the law presumes he has been placed in a worse situation and would be injured, if he had to pay the money back. The law presumes a loss, and it need not be proved. Mr. Justice STORY says in *United States Bank v. Bank of Georgia*, 10 Wheat. 356:

"It is sufficient for us to declare that we place our judgment in the present case upon the ground, that the defendants were bound to know their own notes, and having received them without objection they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature."

But it is said, that Johnston did not see the note before he paid it. So much greater was the negligence the law imputes to him. He had every opportunity to see the note. ARWATER, judge, in delivering the opinion of the court in 2 Minn. p. 84, says:

"If the drawee is allowed to recover on payment of a forged draft, because he has not seen it, he would probably never care to see a draft before payment, but even when presented at his counter and he present, would direct his clerk to pay it, and afterwards take advantage of his own *laches* to enforce a recovery. To admit this would be to

overthrow the long-settled principles of law and require the holder instead of the drawee to guarantee the signature of the drawer, which manifestly would be most unjust and inequitable and destructive of commercial business."

It is unnecessary to pursue this discussion further. Johnston was clearly guilty of negligence in paying the note, and he cannot throw the loss on the Commercial Bank, which was without fault in the premises. He not only did not examine the note, before he paid it, but did not examine it for several days afterwards and did not seem to be certain it was a forgery, until he had examined the books of the Riverside Furniture Company. This was on the 9th day of April, seven days after he had paid the note.

The judgment of the municipal court of Wheeling is reversed, the verdict of the jury set aside, and the case is remanded for a new trial.

REVERSED. REMANDED.

MAYER, RESPONDENT *v.* THE MAYOR, ALDERMEN, AND
COMMONALTY OF THE CITY OF NEW YORK,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1875.

[63 *New York*, 455.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover back money alleged to have been paid to defendant by mistake.

Defendant's counsel on the trial moved to dismiss the complaint upon the ground that plaintiff could not recover back the money, having paid it voluntarily, and there being no mutual mistake. The motion was denied, and defendant's counsel duly excepted.

ANDREWS, J. The general rule that money paid under a mistake of a material fact may be recovered back, although there was negligence on the part of the person making the payment, is subject to the qualification that the payment cannot be recalled when the position of the party receiving it has been changed in consequence of the payment, and it would be inequitable to allow a recovery. The person making the payment must, in that case, bear the loss occasioned by his own negligence. If circumstances exist which take the case out of the general rule, the burden of proving them rests upon the party resisting their payment.

The rule, with its limitation, has come under discussion in several recent cases in this court, and it is unnecessary to restate the grounds upon which it rests. *Union Nat. Bank v. Sixth National Bank*, 43

N. Y. 452; *Duncan v. Berlin*, 46 N. Y. 685; *Lawrence v. American National Bank*, 54 N. Y. 432; *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211.

The plaintiff, who was the owner of lot 28, in block 98, on Fifty-first street, in the City of New York, was assessed, on the 9th day of January, 1871, for the expense of paving the street, and the assessment was confirmed and became a lien on the premises. He afterwards received a notice, issued from the bureau of collection of assessments, directed to the owner of the adjoining lot (27), stating that an assessment had been made thereon for the improvement, and the amount of the same, and notifying the person to whom it was addressed that payment of the assessment would be expected to be made by a time stated. The plaintiff, supposing that the notice related to an assessment on his lot, afterwards, and before the time named for the payment, went to the office of the collector of assessments and presented the notice and paid the assessment therein mentioned to the proper officer and took his receipt. On subsequently ascertaining the mistake he presented a claim for repayment to the comptroller, and the same not being allowed, brought this action to recover the sum so paid by him.

The circumstances bring the case within the general rule, which authorizes a recovery for money paid by mistake. The plaintiff was not liable to pay the assessment on lot 27, and he paid it in ignorance of fact, supposing that the notice related to the assessment on lot 28, and intending to pay the assessment on his own premises. It does not appear that the assessment on lot 27 was, in fact, cancelled of record, or that the evidence that the lien was discharged, authorized to be given by section 16, chapter 579 of the Laws of 1853, was required or was furnished. If an entry was made of its payment, no reason is shown why, upon discovering the mistake, it might not have been corrected, and the collection enforced against the person liable to pay the assessment, or upon his default, by a sale of the land in respect to which the assessment was made. It does not appear that there has been any change of title to lot 27, and the rights of subsequent purchasers are not in question. The plaintiff did not intend to discharge the liability of the owner of that lot when he paid the assessment, and although the money was received by the city in discharge of the assessment on lot 27, it could, on being apprised of the mistake, have returned the money to the plaintiff, and been restored to its original position.¹ *The Mayor v. Colgate*, 12 N. Y. 140.

¹In *Curnen v. Mayor* (1880) 79 N. Y. 511, 515, DANFORTH, J., in commenting upon the case, says: "And it may well be that if it had there appeared that after the mistaken payment the property assessed had passed into the hands of one buying in good faith, and for value, and that the person assessed had become insolvent since the payment, the defendant would have been permitted to retain the money."—Ed.

The city received the money upon a lawful demand, but from a person who was not legally liable to pay it, and we do not find that the circumstance that money paid by mistake is received upon a valid claim in favor of the recipient against a third person prevents a recovery back, provided the claim against the party who ought to pay it is not thereby extinguished or its collection prevented. 43 N. Y. 452; 14 *id.* 432.

The claim is made, on behalf of the city, that the money collected on local assessments is not collected for the benefit of the city, or received into the treasury for its use; and that the city in making local improvements acts for the benefit and in behalf of the owners of the land on which the assessment is made. The paving of streets, the construction of sewers, and works of like character within the city, are spoken of as local improvements, but they are instituted by the corporation, and are public improvements as strictly as any other improvements undertaken by the corporation. The statute, in view of the special benefits which are supposed to result from them to the owners of lands near which they are made, imposes the expenses incurred in making them in whole, or in part, upon the property within the district specially benefited. But the work is a public work. The city contracts for the performance, and, by chapter 397, Laws of 1852, and subsequent statutes, is authorized to borrow the money upon its bonds to pay in the first instance the expenses incurred in prosecuting it. The city treasury is entitled to ultimate reimbursement from the owners of lands which may be locally assessed, and, upon their default to collect the expenses, by a sale of the land; but it receives the money collected through local assessments in its own right, and not as agent or depositary, either of the landowners or the holders of the bonds.

We are of opinion that no obstacle to the plaintiff's recovery exists, and that the defendant cannot justly claim to retain the money received under the circumstances disclosed.

The judgment of the General Term should be affirmed, with costs.
All concur.

*Judgment affirmed.*¹

¹See also *Woolley v. Staley* (1883) 39 Ohio St. 354.

Whenever the consideration fails because of a mistake as to the existence of a claim, to extinguish which money is paid, the plaintiff may usually recover the amount expended. As where a plaintiff indorsed a bill to the defendant on a debt due the latter, but the defendant failed to protest the bill at maturity, thereby discharging the plaintiff. He afterwards discovered, as he thought, that bill was void for not being stamped as an English bill should be, and the plaintiff, being of the same opinion, paid the defendant the amount of the bill. In reality the bill was foreign and so properly stamped. The plaintiff was allowed to recover. *Milnes v. Dunean* (1827) 6 B. & C. 671; and see *Bell v. Gardiner* (1842) 4 M. & G. 11.

In *Mills v. Alderbury Union* (1849) 3 Ex. 590, the plaintiff was surety for

CALKINS v. GRISWOLD.

SUPREME COURT OF NEW YORK, 1877.

[11 *Hun.* 208.]

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

The action was brought to recover money had and received by the defendant, which was alleged to belong to the plaintiffs, and also for money alleged to have been paid by the plaintiffs to the defendant by mistake. The defence set up was an accord and satisfaction. The amount claimed by the plaintiffs was over \$160. The referee reported in their favor for thirty-four dollars and twenty-two cents only (being twenty-seven and one-half dollars, with interest), and the defendant entered judgment for his costs, less that sum.

The essential facts were: On an accounting between the plaintiff and the defendant for a running account and for the purchase of grapes by the former from the latter, as neither party knew the weight of the grapes and crates, they agreed that the weight was 65,600 pounds, and the plaintiff settled accordingly. As a matter of fact the total weight of the grapes was 55,959 pounds. The plaintiff sued for excess paid on the false estimate, and also for an overpayment by reason of an error in the mere computation on the first payment.¹

The referee decided, as matter of law, that the agreement of the tenth of March operated as an accord and satisfaction in respect to the several items included therein, and precluded the plaintiff from recovering the excess paid on account of the grapes, but that the overpayment of twenty-seven dollars and fifty cents having occurred in consequence of the mistake which arose in determining the sum necessary to make satisfaction upon the account, the plaintiffs are entitled to recover the same, with interest.

A. as treasurer of defendant company, whom he paid for money supposed to have been received by A., but which in reality was received by a firm of which A. was a member. The court held that the plaintiff should recover, not being a surety for the firm, but for A. alone.

And so in *De Bahn v. Hartley* (1786) 1 T. R. 343, the defendant took out a policy of insurance on a ship and cargo. The policy contained a warranty that vessel had sailed from Liverpool manned with fifty men. In reality it sailed with only forty-six, but took on six more at Anglesen, six hours after. It was admitted that the insured was not prejudiced by the breach, but having paid in ignorance of it, he was permitted to recover. For a criticism of case see Keener's Treatise, 51.

¹A shortened statement of facts has been substituted for that of the report, and arguments of counsel are omitted.—Ed.

SMITH, J. It is an elementary principle of law, as well as of the plainest equity, that where money is erroneously paid by one person to another, in consequence of a mutual ignorance as to facts, which, if known, would have prevented the payment, the money so paid may be recovered back. *Burr v. Veeder*, 3 Wend. 412. An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. *Mowatt v. Wright*, 1 *id.* 355, 360. A contract made upon an assumed state of facts, as to which there is a mutual mistake, may be rescinded on discovering the mistake, and the party paying money upon it may recover it back. This principle applies to every form of contract, express or implied, including an account stated, and an accord and satisfaction. The principle of an accord and satisfaction is, that a party who has a legal right of action against another may accept of some other legal thing in discharge of his claim. But if the parties to an accord and satisfaction, in settling a claim, act under a mutual mistake of facts, there is nothing in the nature of the transaction which prevents a court of law from correcting the mistake or relieving from its consequences, in a proper action for that purpose. In *Wheaton v. Olds*, 20 Wend. 174, the principle was applied to a case somewhat analogous to this. There, the defendant agreed to sell to the plaintiff from sixteen to twenty hundred bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a storehouse to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed to call the whole quantity 1,900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1,488 bushels delivered. It was then found that the *mistake* had happened by both parties assuming as the basis of the negotiation fixing the quantity of 1,900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to *guess* at the residue, whereas, in fact, only 250 bushels had been loaded—the tallies representing *half* bushels and not *bushels*—and that the parties supposed that the quantity loaded was not a *quarter* of the whole. The action was for money had and received, to recover back the excess paid by mistake. On the trial, the defendant proved by one witness that the plaintiff said that he would take the oats at 1,900 bushels, *hit or miss*, and by another that he had acknowledged that he took the oats at that quantity *at his own risk*. He further proved that before the boat left the storehouse, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, he told them if they were dissatisfied with the quantity, to put the oats back into the storehouse and pay him for his trouble. The plain-

tiff recovered a verdict, and the defendant moved for a new trial, which was denied. COWEN, J., delivering the opinion of the court, said that the mistake, as proved, went not only to the quantity measured, but the jury found, under the charge, that relatively it influenced the entire agreement to take the oats at 1,900 bushels; and that being the case, the learned judge said he was not aware of any case or *dictum*, that, because part of the agreement was to take at the party's own risk, or, as the parties expressed it, hit or miss, it therefore formed an exception to the general rule. The agreement to risk was, *pro tanto*, annulled by the error. The foundation of the arrangement to take the plaintiff's risk was a misreckoning, one number being put instead of another, "which," says Domat (pl. 12), "is a kind of error, in fact different from all other errors, in that it is always repaired."

In the present case the referee has not found, indeed, in terms, that the parties acted under a mutual mistake, but he has found that, at the time of the accounting, they did not know or recollect accurately the weight of the grapes or the crates; that they agreed to call the crates 600 pounds, and the grapes, after deducting the crates, 65,000 pounds, and that in fact the whole quantity of grapes delivered was 55,959 pounds. He has not found that there was any dispute as to the quantity of grapes, and the uncontradicted testimony shows there was no dispute on that subject, the plaintiff having suggested the quantity, and the defendant having agreed to it without question. There was a difference between them as to the weight of the crates, but the defendant compromised nothing in that respect, as his claim was acceded to by the plaintiff. There is no finding inconsistent with the fact of a mutual mistake, and we are therefore to look into the evidence to see what it establishes in that respect. There is uncontradicted evidence in the case, which leaves no doubt that Caulkins, at least, acted under a mistake as to the weight of the grapes. He so testifies, and upon no other reasonable theory can his proposal be accounted for to pay for several thousand pounds more than had been delivered. It is equally manifest from the evidence that the defendant also was mistaken as to the quantity of the grapes, unless he was practicing a fraud upon Caulkins. There is no ground for the suggestion that he merely kept silence on the subject. Caulkins testified that the defendant said he thought the figures were about right, as they were about as he had them at home.

The defendant did not deny the statement, and he himself testified that when the plaintiff announced, after figuring a long time, that he made the defendant's account to be 65,600 and some pounds, the defendant replied that "may be that was right," although proposing at the same time to examine the matter before settling. If he *knew* the correct amount at that time, his own account of the conversation shows that he was not acting in good faith. There is

some evidence of his subsequent declarations, tending to show that he did know the true amount at the time of the accounting and that he took advantage of the mistake of Caulkins, but as the report of the referee is silent upon the question of fraud, it is to be implied that his decision upon that issue was adverse to the plaintiffs, and there is not such a decided preponderance of evidence the other way as to lead to the conclusion that the implied finding is against the weight of evidence. The only other conclusion, then, warranted by the evidence, is that the defendant participated in the mistake of the plaintiff as to the quantity of grapes. The mistake was mutual, and it entered into the accord and satisfaction. The parties "jumped accounts" as the defendant expressed it, upon the mistaken assumption that the quantity of grapes delivered was 65,000 pounds. But for that mistake, the sum fixed upon would not have been agreed to. And as there was no dispute about price or quality, it is apparent that if the parties had known the correct quantity at the time, they would have agreed on the sum which it now appears was the true amount owing upon the contract. The accord is not a bar to the correcting of a mistake by which the accord was induced.

The referee very properly held the plaintiffs entitled to recover the money paid, in consequence of the mistake made in computing the amount due upon the basis of the accord. He should have gone further and allowed to the plaintiffs the money paid by mistake for grapes in excess of the quantity delivered. The same principle which corrects one mistake will correct the other. In either case it is unconscientious that the defendant should retain the money; it equitably belongs to the plaintiffs, and no rule of law stands in the way of their recovering it.

Judgment reversed and new trial ordered before another referee, costs to abide event.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial ordered before another referee, with costs to abide event.¹

¹The law is generally in accord with the principal case.

As to a plaintiff recovering money overpaid to the assignees of a bankrupt, see *Malsolm v. Fullerton* (1788) 2 T. R. 645.

Where defendant had recovered from one insurance company the full amount of insurance, and then from the plaintiff company the amount of its policy, the whole being greater than the value, the plaintiff was permitted to recover his proportionate amount of the excess. *Irving v. Richardson* (1831) 2 B. & A. 193. See also *Bruce v. Jones* (1863) 1 H. & C. 769; *Kenny v. Clarkson* (1806) 1 Johns. 385; *Watson v. Ins. Co.* (1811) 3 Wash. C. C. 1; *Burnand v. Rodocanachi* (1882) L. R. 7 App. Cas. 333; *Clarke v. Western Assurance Co.* (1892) 146 Pa. St. 561.

So, if one partner sells to another subject to a deduction on a contingency, which occurred, but of which the partner paying, owing to his own negligence,

FIRST NATIONAL BANK OF OMAHA v. THE MASTIN BANK
AND KERSEY COATES, ASSIGNEE.

CIRCUIT COURT OF THE UNITED STATES, 1880.

[2 *McCrary*, 438.]

THIS case is submitted to the court for final decision upon an agreed statement of facts, from which it appears that the plaintiff and the Mastin Bank, between July 1 and August 1, 1878, had maintained a correspondence and account, and had remitted to one another divers sums of money, and also demands, notes, bills, and accounts against third parties for collection and credit. On the twenty-seventh of August, 1878, the Mastin Bank, then having a considerable balance in the hands of the plaintiff, directed the plaintiff to remit said balance to the Metropolitan National Bank of New York, to the credit of the Mastin Bank, in even hundreds of dollars. At the time the books of the plaintiff showed a balance due the Mastin Bank of a little more than \$8,800; and accordingly the plaintiff remitted to the said Metropolitan National Bank of New York \$8,800, to be placed to the credit of the Mastin Bank. Prior to that time, however, the plaintiff had sent to the Mastin Bank for collection a draft drawn by one Faut for \$3,141, which said Mastin Bank had collected on the seventeenth of July, and duly credited the plaintiff on its books; but the plaintiff by mistake omitted to charge the said sum to the Mastin Bank, and therefore sent to the Metropolitan National Bank a larger amount of money than was due to the Mastin Bank. A few days after this transaction the Mastin Bank failed and made an assignment to the respondent, Kersey Coates, assignee, under the laws of the state of Missouri, transferring to him all its property and credits of every kind whatsoever. The assignee demanded and received from the Metropolitan National Bank the money held by it to the credit of the Mastin Bank, including the sum which plaintiff had sent to it by mistake, and which it is agreed amounts, less certain credits, to \$1,816.22. Plaintiff, as soon as advised of the mistake, demanded the return of the money from the Mastin Bank, as well as from the Metropolitan National Bank, and also made the same demand upon the assignee after his appointment.

McCrary, Circuit Judge. The fact is admitted by the agreed state-

was ignorant, he may recover the amount so paid. *Townsend v. Crowdy* (1860) 8 C. R. N. S. 477; and see *Ivinson v. Hutton* (1878) 98 U. S. 79.

If, owing to a mistake, money is paid in excess of an award, it may be recovered. *Mayer v. Erben* (1868) 3 Abb. App. 255.

If money is paid by mutual mistake, wholly without consideration, it may likewise be recovered. *Stewart v. Kindel* (1890) 15 Colo. 539.—Ed.

ment that plaintiff sent to the Metropolitan National Bank in New York, to be placed to the credit of the Mastin Bank, the money now in controversy in consequence of a mistake of fact. When the plaintiff stated the account in order to ascertain the sum to be sent to the New York Bank, one item thereof was omitted by reason of an error of the accountant, or because the bank had not received notice at that time of the collection, by the Mastin Bank, of the Faut draft. The result of the transaction was that the plaintiff sent to the Metropolitan National Bank, to be credited to the Mastin Bank, more money than was due to the latter; or, in other words, there was placed in the hands of said Metropolitan National Bank \$1,816.22 which did not, in equity, belong to the Mastin Bank. It was, however, placed to the credit of that bank, and after the assignment it passed into the hands of the assignee.

As between the original parties to this transaction it cannot be claimed that the Mastin Bank acquired any interest in or right to the money now in dispute. It is a principle of equity too plain to require a citation of authorities to support it, that where one person, by mistake, delivers to another money or property without consideration, he may recover it back; and where the identical property cannot be found and recovered, equity permits him to pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder. Where both parties intended the delivery of a particular sum of money, and where, by the mistake of both, a larger sum was delivered, the party receiving the excess becomes, in equity, a trustee for the real owner thereof and bound to deliver it upon demand to him.¹ The ground upon which this rule proceeds is, that mistake or ignorance of facts is a proper subject of relief when it constitutes a material ingredient in the contract or acts of the parties, and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from the violation of the obligations which are imposed by law upon the conscience of either party.

It is equally clear that the plaintiff has a right to relief against the assignee who claims by a general assignment under the laws of Missouri, for the reason that the assignee is deemed to possess the same equities only as the debtor himself would possess.

It is my opinion that upon the principles of equity the plaintiff is entitled to recover the sum of money in controversy in this suit, and decree will be entered accordingly.

¹Conf. *Utica Bank v. Van Gieson*, 18 Johns. 435.

It was held in *Lamb v. Cranfield*, 43 L. J. Ch. 408, by Jessel, M. R., that the sole remedy for the recovery of money so paid was at law. See, however, *Bingham v. Bingham*, [(1748) 1 Ves. Sr. 126]; *Henderson v. Overton*, 2 Yerg. 394; *Neal v. Read*, 7 Bax. 334.—Judge KEENER'S note.—ED.

HULL v. BANK OF SOUTH CAROLINA.

COURT OF APPEALS OF SOUTH CAROLINA, 1838.

[*Dudley (S. C.)*, 259.]

BEFORE O'NEALL, J., at Charleston, May Term, 1837.

This action was brought to recover money paid by mistake to the defendant.

The case proved was that one Hopton was indebted to the defendant in the sum of \$78. The defendant being informed that Hopton had money in the Bank applied to him for a check, and he was told both by him and another person that Hopton had no funds there. The defendant, however, persisted, and Hopton at last gave the check, and the defendant receipted his account in full. He presented the check at the Bank, and it was paid. On the evening afterwards, it was discovered that Hopton had before the payment of this check drawn out all his funds. The payment was made on the assurance by the Book-keeper, that Hopton's account justified it, though he did not refer to the ledger, which would have prevented the mistake.

On the next day notice of it was given to the defendant and he was asked to correct it, and refused to do so.

A motion for non-suit was made and overruled, and the jury were instructed that if a mistake in fact had been made by the Bank in paying the money they were entitled to recover it back; and that there had been a mistake, unless they could infer from the evidence that the money was paid by the bank in honor of the drawer of the check.

They found for the plaintiff.

The defendant moved the Court of Appeals for a non-suit, on the grounds:

1st. Because the drawer of a Bank check, after the same had been paid on presentment, can have no recourse against the payee.

2d. Because there was no legal evidence that the drawer had not funds in the Bank at the time it was presented, and in absence of such evidence the plaintiff had no right to recover.

3d. Because there was no tender proved of the check to the defendant, and that having released his account, he was deprived of the only proof of his debt by the act of the plaintiff.

4th. Because no credit is given to the payee of a check by the Bank; and there is no privity between them.

And for a new trial—

1st. Because the judge charged the jury that the plaintiff was en-

titled to recover in any event, except they believed that the plaintiff intended to make an advance to the drawer of the check.

2d. Because the verdict is contrary to the law and the evidence.

BUTLER, J., delivered the opinion of the court.

The presiding judge held that if a mistake in fact had been made by the Bank in paying the money, they were entitled to recover it back in an action for money had and received.

This question is to be decided rather by authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than Banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and impositions, but they may against mistakes, depending on an inspection of their own books and accounts. Mistakes may be prevented, which cannot be remedied. They accepted and paid the check presented by the defendant, for and on account of Hopton the drawer, whose money they had kept for his convenience and accommodation. The privity of contract was between them and their customer Hopton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hopton. In the case of *Levy v. The U. S. Bank*, 4 Dallas, 234, the plaintiff presented a bill of exchange; the Bank gave the plaintiff credit on the books, believing that the bill was genuine; the bill turned out a forgery, and the Bank cancelled the credit; the plaintiff, however, contending that he was entitled to recover the money, because the Bank had duly accepted the papers, and had done that which was equivalent to payment. The principle difficulty in the case was, whether the credit in the books amounted to payment; and it was held by the court that it did, and the plaintiff recovered. It seemed to have been conceded that if the Bank had paid the money, there was no doubt of Levy's right to retain it. In the case of *Price v. Neale*, 3 Burrows, 1354, the defendant accepted a forged bill; Lord MANSFIELD said it was an established principle that once a drawer of a bill had accepted it, he could not refuse to pay; or once having paid it, could not recover it back; unless there was fraud on the part of the endorser who procured the acceptance. And in *Jeneys v. Fawler*, 2 Strange, 946, it was held that once a bill has been accepted, it is not necessary to prove the hand writing of the drawer, for the acceptor was liable to the payee.

The question in the above cases arose on bills of exchange, and it is attempted to distinguish them from bank checks. A Bank check has all the characteristics of bills of exchange, and cannot be distinguished from them. Indeed they perform not only all the offices of bills, but are more generally used for the transfer and payment of monies. They are mercantile agents which should not be crippled in their daily and hourly operations. Before one reaches the Bank after it has been drawn, it may have paid and discharged many

debts, and after it has been accepted and paid, all the intervening holders in general are discharged from all liabilities to the bank; it becomes then a transaction between the Bank and the drawer, the Bank not unfrequently paying the money on checks of the drawer, when in fact he has no deposit.

In a note in 1 Camp. 425, checks and bills are both spoken of and put upon the same footing; and it seems to be clearly laid down and settled, that a check once credited in the books of a bank is an acceptance, and subjects the acceptor to payment; and that when the check has been actually paid, that the Bank must look to the drawer for redress, and not the payee; 6 East, 199; *Cox v. Masterman*, 17 & E. C. L. R. 517. This case is decided entirely as the case made by the presiding judge. For if the plaintiff by fraudulent contrivance procured the check to be drawn, and obtained the payment of it under false pretences, or wilfully and designedly suppressed the truth where he should have told it, he might be held liable. Fraud contaminates all contracts, and would deprive a payee of a check or bill of all the protection which the law extends to those who act in good faith. This last point of view depends on the facts of the case, which may fairly be considered by another jury, under proper instructions from the court.

The motion for a new trial is granted.¹

¹In *Chambers v. Miller* (1862) 13 C. B. N. S. 125, the defendants as drawers paid a check to the plaintiff as holder. While the plaintiff was counting over the money, the cashier who paid him, having discovered that the drawer had insufficient funds in the bank to meet the check, demanded the money back, and on the plaintiff's refusal to return it, detained him forcibly until he did, under threat of arrest for stealing. The court held that title to the money passed to the plaintiff, notwithstanding the cashier's mistake. But where there are two branch banks of the same institution, and a check of a depositor of one is paid by the other, the court declined to consider this payment within the present rule. *Woodland v. Fear* (1857) 7 E. & B. 519. A draft given in exchange for a check is considered a payment. *First National Bank v. Devenish* (1890) 15 Cal. 229.

A more difficult question arises where no money changes hands, the whole matter being one of debit and credit. When the amount has been entered in the pass book only, without giving credit on the bank's books, it has been held that title did not pass. *National Gold Bank & Trust Co. v. McDonald* (1875) 51 Calif. 64. But this principle was modified in *Oddie v. National City Bank* (1871) 45 N. Y. 735, but see *National Park Bank v. Manufacturing Co.* (1890) 11 N. Y. Supp. 538. However, if the check is deposited and credited, both on the pass book and on the bank's books, it is considered payment, *National Bank of Salem v. Burns* (1880) 68 Ala. 267, though, of course, if the depositor is guilty of misrepresentation or fraud, there could be no recovery. *Peterson v. Union National Bank* (1866) 52 Pa. St. 206; *Martin v. Morgan* (1819) 3 Moore C. P. 635. And it has been held a question for the jury whether or not, under a custom which gave a limited time to the bank for rejecting for

IN *Leather v. Simpson* (1871) L. R. 11 Equity, 398, the plaintiff accepted and paid two bills of exchange on the faith of bills of lading, which, it was afterwards discovered, were forgeries. In delivering a decision, denying the plaintiff a recovery, Sir R. MALINS, U. C., said:

"As to the general law of misrepresentation, I do not think it necessary to go into it in this case, because the law is perfectly clear, that if the court was warranted in treating this as a representation

lack of funds, a check was received as a deposit. *National Bank v. Burkhardt* (1879) 100 U. S. 686.

Where the question arises between banks operating under Clearing House rules, the plaintiff seeking to recover for bad paper accepted but returned after the time limit fixed by the rules, various considerations have been said to control. In *Preston v. Canadian Bank* (1883) 23 Fed. 179, the court insisted on the strict time limit, refusing a recovery on a check returned fifteen minutes after the limit. In *Merchants' National Bank v. National Eagle Bank* (1869) 101 Mass. 281 [acc. *Merchants' National Bank v. National Bank of Commonwealth* (1885) 139 Mass. 513], recovery, on check returned after time, was permitted, the defendant not having changed his position; though the same court in *Boylston National Bank v. Richardson* (1869) 101 Mass. 287, under practically the same state of facts, having found laches, refused a recovery. In New York, recovery seems to depend on the laches of the plaintiff and the change of position of defendant. *Allen v. Fourth National Bank* (1874) 59 N. Y. 12.

In England, the unprovisional issuing of a credit slip seems conclusive, where the funds are insufficient. *Pollard v. Bank of England* (1871) L. R. 6 Q. B. 623.

See note to *Cocks v. Masterman*, cited in *Ellis v. Ins. Co.*, *ante*.

For a discussion and criticism of these cases, see Keener's Treatise, §1 *et seq*.

As to when an acceptance may be retracted, see *Dearborn National Bank v. Carter Rice & Co.* (1890) 152 Mass. 34; *Trent Tile Co. v. Dearborn National Bank* (1892) 23 Atl. 423.

As to the right of a drawee to withdraw a certification once given, the courts are not agreed, though it would seem a withdrawal may be allowed when the certification was owing to mistake as to the amount of funds, and the defendant has not changed his position. *Bigelow, Bills, Notes and Cheques*, 69.

"The defendant certified the check in question as being good. The plaintiff took the check in the ordinary course of business, for value and in good faith. There is nothing shown to impeach his title. The check turned out to be a forgery. It cannot be questioned that the bank is liable to make good its certificate by paying the check. *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 26 How. Pr. 1; *Price v. Neal*, 3 Burr. 1354; Com'l. &c. *Bank v. First Nat. Bank*, 30 Md. 11. The principle upon which this liability rests is stated by HOLT, Ch. J., in *Hern v. Nichols*, 1 Salk. 289, namely, that 'seeing somebody must be a loser by this deceit, it is more reason that he that confides in the deceiver should be loser, than a stranger,' and has become an established rule of law in cases identical with this."—*Hagan v. Bank* (1872) 64 Barb. 197. And see note in this point in 17 Am. St. Rep. 899.—Ed.

by the Union Bank of London, as if they had said, 'We hold the bill of lading, which is a genuine bill of lading, or which we guarantee to be a genuine bill of lading'—then if they had so undertaken, and it turned out to be a bad bill of lading, it would have been money obtained on a representation which was untrue; and the rules of this court are settled, that when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue; because every man making a representation inducing another to act on the faith of that representation must make it good if he takes upon himself to represent that which he does not know to be true, and he is equally bound if he made it without knowing it to be untrue. Therefore, if the memorandum relied upon had amounted to a representation that the document was genuine or a guarantee, the consequence would be plain that the plaintiffs must have been indemnified by the Union Bank of London, and the money they have received must have been returned, because it was obtained upon a representation which turns out to be untrue. If there be a distinction between this case and the cases of *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4, and *Robinson v. Reynolds*, 2 Q. B. 196, I confess it appears to me to be rather more unfavorable to the plaintiffs, because in *Thiedemann v. Goldschmidt* the money had not been paid, whereas here they elected to pay the money on a rebate of interest before the bill became due, which precludes them from saying that it had not arrived at maturity. The plaintiff Beach trusted to his own correspondent Shute, that he would not transmit anything but a genuine bill of lading. The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be restored. I can see no distinction between a bill filed to have the acceptance delivered up before it has arrived at maturity, and a bill filed to have the money restored after the bill has arrived at maturity, or has been treated as having arrived at maturity, and the amount of it paid.

"Upon these grounds I am of opinion that the bill fails, and must be dismissed."

Concerning this case, Mr. Ames says: "This case cannot rest on the ground that the defendants, by receiving payment, relinquished rights against prior parties, for being agents for collection of Union Bank, which was, in turn, agent for Schuchardt & Sons, they could sue either on the bills of exchange, in any event. To the same effect is *Hoffmann v. Bank of Milwaukee* [see *infra*]. In the following cases, when the drawer's signature was forged, the holder who had collected was allowed to retain the money, although he gave up no

IN *Hoffman & Co. v. Bank of Milwaukee* (1870) 12 Wall, 181, under the same facts, the Supreme Court of the United States reached the same result, and by CLIFFORD, J., said:

"Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. *Fitch v. Jones*, 5 El. & Bl. 238; *Arbouin v. Anderson*, 1 Ad. & E. N. S. 498; *Smith v. Braine*, 16 Q. B. 244; *Hall v. Featherstone*, 3 H. & N. 287.

"Such an instrument, as between the payee and the acceptor, imports a sufficient consideration, and in a suit by the former against the latter the defence of prior equities, as between the acceptor and the drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

"Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the

rights against any indorser, having taken the bill from the wrongdoer. *Commercial Bank v. First National Bank*, 30 Md. 11; *Salt Springs Bank v. Syracuse Inst.*, 62 Barb. 101; *Levy v. U. S. Bank*, 1 Binney, 27; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141; *Howard v. Mississippi Bank*, 28 La. Ann. 727. See also *Mather v. Maidstone*, 18 C. B. 273."—Ms. note.

See *U. S. Bank v. Bank of Georgia* (1825) 10 Wheaton, 333.—ED.

contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same, and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described.

"Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

"Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale, and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of exchange. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. *Leather v. Simpson*, L. R. 11 Eq. 398."

AIKEN, PUBLIC OFFICER, ETC. v. ELIZABETH SHORT.
EXECUTRIX OF FRANCIS SHORT.

EXCHEQUER, 1856.

[1 *Hurlstone & Norman*, 210.]

ACTION for money had and received. Plea never indebted.

At the trial before PLATT, B., at the Middlesex sittings, in last Hilary term, the following facts were proved: The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February, 1846, by which he gave his property equally amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the banking company his

one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of £200, which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter, and Charles Carter, dated October, 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the bank, that the bank should pay off this sum of £200 and interest. In May, 1855, the bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the bank for payment of the £200, and interest, stating that he had applied to George Carter, who had referred him to the bank. The bank accordingly, through their attorney, paid to the defendant the sum of £226 16s. 6d. The bond and instrument of mortgage were handed over by the defendant to the bank, and they took a receipt for the money due on the bond and mortgage. In August, 1855, John Carter produced a will of Edwin Carter, dated April, 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of £100, which ceased upon his making any assignment. The bank then applied to the defendant to refund the £226 16s. 6d. previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

POLLOCK, C. B. We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter,—a bond and a security on property which Carter afterwards mortgaged to the bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. In consequence of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader,

and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the bank, as the agents of Carter.

PLATT, B. I am of the same opinion. The action for money had and received lies only for money which the defendant ought to refund *ex aequo et bono*. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the bank. Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it.

BRAMWELL, B. My brother Martin, before he left the court, desired me to say that he was of the same opinion, and so am I. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. See *Wilson v. Thornbury*, L. R. 10 Ch. 239. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the bank thought that they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In *Pritchard v. Hitchcock*, 6 M. & G. 151, a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

IN *Harris v. Loyd* (1839) the plaintiff, a trustee under a trust deed for the creditors of A, paid to the defendant, a sheriff, under protest, the amount of a supposed but really non-existent encumbrance in order to release the goods seized by the sheriff, the latter paying over the

funds so seized to the execution creditor. The plaintiff sued to recover the money as having been paid under a mistake of fact. The court sustained a non-suit, ALDERSON, B., saying: "This is money paid, not under a mistake, but under a bargain. True, it turns out to be a bad bargain; but that will not affect its validity. But further, the money is paid to the sheriff for the purpose of being paid over to the execution creditor, subject only to the plaintiffs' supposed right under the deed. By the delivery of the writ to the sheriff the goods are bound, and the property in them cannot afterwards be transferred by the debtor, except subject to the interest of the execution creditor. There can be no doubt that the delivery to the deputy in London is a delivery to the sheriff; the deputy is appointed for that very purpose. The plaintiffs were wrong, and the sheriff right, at the time of the payment, and it was the duty of the sheriff to pay over the money to the execution creditor. Can it be argued, that after such payment over, he can be compelled to refund it? I think not. I am of opinion, therefore, that the rule ought to be discharged."¹

IN *Dambmann v. Schultung* (1878) 75 N. Y. 55, EARL, J., speaking for the court, said:

"It is further claimed that the plaintiff ought to be entitled to relief on account of mistake. He testified that he would not have executed the release if he had known the defendant's financial condition. But as already shown, the defendant was in no way responsible for his ignorance, and was under no legal or equitable obligation to disclose the facts as to his pecuniary circumstances. The plaintiff could have learned the facts by inquiry of the defendant or his vendees. There was no mistake as to any fact intrinsic to the release. Plaintiff knew that the defendant had not been legally discharged from his liability, and that for the \$5,000 he was to give him an absolute release; and he gave him just such a release as he intended to. There was no mistake of any intrinsic fact essential to the contract or involved therein. The defendant's financial condition was an extrinsic fact, which might have influenced the plaintiff's action if he had known it. But ignorance of or mistake as to such a fact is not ground for affirmative equitable relief. The following illustrations of mistakes as to intrinsic facts essential to contracts, against which courts of equity will relieve, are found in the books. A. buys an estate of B. to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, that B. has no title; in such a case, equity will relieve the purchaser and rescind the contract. *Bingham v. Bingham*, 1 Vesey, 126. If a horse should be

¹Cf. *Kieth v. Grant* (1792) 4 Morr. Dic. 2933; *Whiting v. City Bank* (1879) 77 N. Y. 363.—Ed.

purchased, which is by both parties believed to be alive, but is, at the time, in fact dead, the purchaser would, upon the same ground, be released by rescinding the contract. *Allen v. Hammond*, 11 Peters, 71. If a person should execute a release to another party upon the supposition, founded on a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside. *Hore v. Becher*, 12 Simons, 465. If one should execute a release so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made, a court of equity might either cancel the release or restrain its application as intended. *Cholmondeley v. Clinton*, 2 Meriv. 352; *Dungers v. Angove*, 2 Ves. 304. On the other hand, if the vendee is in possession of facts which will materially enhance the price of the commodity and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid. *Laidlaw v. Organ*, 2 Wheat. 178. In such a case the facts unknown to the vendor are extrinsic to the contract and are not of its substance; and hence there is no ground for the interference of a court of equity.

"It is clear from these, and other illustrations which might be given, that a court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance.

"Judge STORY lays it down as a general rule 'that mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.' Story's Eq. Jur., § 151."

STEPHENS v. BOARD OF EDUCATION.

COURT OF APPEALS OF NEW YORK, 1879.

[79 *New York*, 183.]

APPEAL from judgment of the General Term of Supreme Court, in the second judicial department, in favor of plaintiff, entered upon an order overruling exceptions and directing judgment upon a verdict.

This action was brought to recover moneys alleged to have been received by defendant belonging to plaintiff.

The facts appear sufficiently in the opinion.¹

ANDREWS, J. There is no dispute as to the material facts. On and prior to the 18th of December, 1871, one Gill was a member of the board of education of the city of Brooklyn, and, as attorney for said board, received \$3,600.84, the money of the board, which he wrongfully converted and appropriated to his own use. Soon after the date mentioned, he procured from the plaintiff on a mortgage forged by him on the property of a third person \$4,129.34 in a check of the plaintiff which on the 21st of December, 1871, he deposited in a bank, to his credit, and on the same day drew his own check on the bank in which the deposit was made, to the order of the board of education for the amount of the money fraudulently appropriated by him and delivered the same to the board, and the board thereupon credited the check to Gill in discharge of his debt. The check was paid in due course, and the money received thereon was used by the board in its business. The plaintiff, about two months thereafter, ascertained that the mortgage received from Gill was a forgery, and then demanded from the defendant the money received from Gill. The defendant had no notice, when it received the check from Gill, of the fraud by which he obtained the money of the plaintiff, nor had it any information as to the source from which the money to his credit in the bank was derived. The first information which the defendant had of the facts in respect thereto was at the time of the demand made by the plaintiff, before referred to.

The question is presented whether, under these circumstances, the plaintiff can maintain an action to recover the money received by the defendant from Gill and applied in payment of the debt owing by him to the defendant. We are of opinion that the action will not lie. The money having been obtained by Gill from the plaintiff by fraud and felony the former acquired no title thereto and the plaintiff could recover it from Gill if found in his possession, or he could follow it into the hands of any person who received it from Gill without consideration or with notice of the fraud by which he obtained

¹The arguments of counsel are omitted.—ED.

it. The money when deposited by Gill in the bank, was still the money of the plaintiff. The bank was a mere depository and while it so remained, the plaintiff could have compelled the bank to restore the money to him as the rightful owner. (Tradesmans' Bk. v. Merritt, 1 Paige, 302; Mechanics' Bk. v. Levy, 3 *id.* 606; Pennell v. Deffell, 4 De Gex, M. & G. 372.) But the bank, having paid it out on the check of Gill without notice of any defect in his title, was thereafter protected against any claim of the plaintiff therefor. The plaintiff, however, passing by the bank to whose possession the money first came from Gill, claims to recover of the defendant on the ground that the defendant, having received it from Gill in payment of an antecedent debt, cannot be permitted to retain it as against the plaintiff. No authority has been cited which sustains this position. The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in due course of business. This, said Lord HOLT in 1 Salk. 126, is "by reason of the course of trade which creates a property in the assignee or bearer"—and in *Miller v. Race*, 4 Burr. 452, Lord MANSFIELD said: "The true reason is upon account of the currency of it; it cannot be recovered after it has passed into currency." No suspicion is cast upon the *bona fides* of the defendant. It received the money in the ordinary course of business, and for a good and valid consideration. The defendant had no connection with the fraud of Gill. He did not act or assume to act as the defendant's agent in the transaction with the plaintiff. The money was not obtained through or by means of his relation to the defendant. The position and rights of the parties are precisely the same as if Gill had not been a member of the board when the payment was made, or as if the debt which he paid had not originated in any violation of trust. It is said that the case is to be governed by the doctrine established in this State that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The

law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. "Money," said Lord MANSFIELD, in *Miller v. Race*, before cited: "shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business." The question involved in this case was considered by JOHNSON, J., in *Justh v. Bank of Commonwealth*, 56 N. Y. 478, and he says: "In the absence of trust or agency I take the rule to be that it is only to the extent of the interest remaining in the party committing the fraud that money can be followed as against an innocent party having a lawful title founded upon consideration; and that if it has been paid in the ordinary course of business, either upon a new consideration or for an existing debt, the right of the party to follow the money is gone." The case perhaps did not call for a decision upon the point whether an existing debt was a sufficient consideration to uphold a title to money fraudulently obtained by a debtor, and by him paid to his creditor, as against the defrauded party; but we think it correctly declares the rule of law upon the subject. The case of *Caussidiere v. Beers*, 2 Keyes, 198, is entirely consistent with the rule here declared. The defendant in that case had no right to the money either against the agent from whom he obtained it or the principal to whom it belonged. The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.¹

LEMANS v. WILEY.

SUPREME COURT OF INDIANA, 1883.

[92 *Indiana*, 436.]

FROM the Wabash Circuit Court.

ZOLLARS, J. The complaint by appellee against appellant is for money had and received. Trial, verdict, and, over a motion for a new trial, judgment for appellee for \$211.75. The overruling of the motion for a new trial is assigned as error in this court. One of the causes urged for a new trial is that the verdict is not sustained by sufficient evidence.

¹Accord: *Walker v. Conant* (1888) 65 Mich. 194; *Clark v. Wyatt* (1893) 139 N. Y. 452; *Southwick v. First National Bank of Memphis* (1881) 84 N. Y. 420.—ED.

The following are some of the cases in which an action for money had and received will lie:

"If one man has obtained money from another through the medium of oppression, imposition, extortion or deceit, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrongdoer, he has no right to retain it; and the law, therefore, implies a promise from him to return it to the lawful owner, whose title to it cannot be destroyed or annulled by the fraudulent and unjust dispossession. . . . So, where money has been received by mistake of facts, or without consideration, or upon a consideration that has failed, it may be recovered back. So, money received under a special contract that has been rescinded, may be recovered in an action for money had and received." *McQueen v. State Bank*, 2 Ind. 413. See also *Muir v. Rand*, 2 Ind. 291; *Hatten v. Robinson*, 4 Blackf. 479; *Ferguson v. Dunn*, 28 Ind. 58; *Hunt v. Milligan*, 57 Ind. 141.

"An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances, that in equity and good conscience he ought not to retain the same, and which, *ex aequo et bono*, belongs to the plaintiff." 4 Wait Actions and Defenses, p. 469. Other cases might be instanced, but these are sufficient for present purposes.

Does the evidence in this case make a case against appellant for money had and received?

The undisputed facts in the case are as follows, viz.: Jackson Wiley, the husband of appellee, died in March, 1877, the owner of a tract of land, which descended to his children and his widow, appellee. This land was purchased from appellant by said Jackson Wiley, and at the time of his death \$400 and over of the purchase-money was unpaid. For this appellant held two notes executed by said Wiley on the 28th day of August, 1875, one for \$100 and one for \$300, the latter being secured by mortgage upon the land. In September, 1877, appellant being in need of money, called upon appellee with the notes and said to her that he wanted the money on the notes held by him (which were then overdue), and that if he could not get some of the money he would have to foreclose the mortgage. At the time of this call appellant was indebted to one English upon a promissory note in the sum of \$103. Appellee had sold personal property to English, and in part payment therefor had become the owner of his note on appellant. English owed her a balance over and above the note. Appellee put this note into the possession of appellant, and paid him \$12 in cash. Upon receiving this note and the \$12 in cash, the following endorsement was made upon the \$100 note held by appellant, viz.: "Wabash, September 7th, 1877. Received of Charlotte Wiley one

hundred and fifteen dollars in full of this note and interest." This credit consisted of the English note so received by appellant, and the \$12 in cash; and they together equalled the principal and interest of the note upon which the credit was so made.

After this endorsement was so made, the note containing it was surrendered to appellee, and she has held it ever since, and made no offer to return it to appellant. On the same day this note was so surrendered, a son of appellee paid to appellant \$46.70, which was credited upon the \$300 note held by appellant, as follows: "\$46.70. Wabash, September 7th, 1877. Received of James Wiley forty-six and 70/100 dollars." On the next day appellant received of appellee, or of the money due her from English, \$78, and the same was endorsed upon the \$300 note, as follows: "\$78. September 8th, 1877. Received by the hands of C. Wiley seventy-eight dollars, to apply on the within note."

Appellee wanted the endorsements made on the notes, so as to show that she had paid the money. After the endorsements were made, they were read over to her. At that time appellee was living upon the land, and there was some talk about paying off the mortgage.

William Riley, a son of appellee, told her that if the land should be sold she would get her money back. In the fall of 1878, the residue of the \$300 note not having been paid, appellant foreclosed his mortgage for the balance due upon that note, giving credit for the amount endorsed upon it. To this foreclosure proceeding appellee was a party.

As we have said, the above are the undisputed facts in the case; they are gathered, in the main, from the testimony of appellee.

Appellant testified that all of the money received by him, including the English note, was received as payments upon the notes held by him, and that, in pursuance of such payment, he surrendered one of said notes to appellee. In testifying in the case, appellee's sons, as well as herself, almost uniformly speak of the *payment* to appellant. Upon the whole evidence in the case, there can scarcely be a doubt that the note and money received from appellee by appellant were paid and received in full payment of one, and in part payment of the other, of the notes held by appellant.

It is contended, however, that the testimony of appellee tends to sustain the verdict and make good the averments of the complaint, and that, therefore, the judgment cannot be reversed upon the weight of the evidence. The statements of appellee, other than as contained in the above stated facts, are as follows:

"I let him have the money. At the time I let defendant have the money he held two notes that were due, given by my deceased husband; and when he came he said he wanted money on them, and if he could not get some he would have to foreclose the mortgage on the land; he came with the notes, and I traded notes; nothing was said, par-

ticular, about paying out the farm; I suppose he wanted money, and I paid it to him; after the endorsements were made he read them over to me, and said that it was according to law, and that I would get the money back when it was settled up; if we did not pay out the land, I was to get my money back, though he did not just say that; he did not say that he would pay it back, but that I should not lose anything by it; William Wiley (a son) said if the land was sold I would get my money back; I paid \$115 and \$78; I got the \$100 note of defendant, and have had it ever since."

It is true, that in another place she says that she did not pay the money upon the note and mortgage, but her testimony as a whole shows that she did pay it in exchange for the \$100 note, and as part payment of the other note held by appellant. The rule that this court will not reverse a judgment when the evidence tends to sustain the verdict or finding does not go so far as to authorize an affirmance upon an isolated statement of a witness which is in conflict with other statements of the same witness. Taking the whole of her testimony together, there is nothing showing, or tending to show, that appellant obtained the money and note from her "through the medium of oppression, imposition, extortion or deceit," nor that it was paid over and the notes exchanged through mistake of facts; nor is there anything to show a want or failure of consideration, nor that there was a special contract which had been rescinded.

There was no contract or promise on the part of appellant to receive the money or note as the money and note of appellee, or to in any way return the one or its amount, or repay the other. The consideration was ample. Appellee was not personally liable upon the notes held by appellant, but she was the owner of the undivided one-third of the land held for the purchase-money and covered by the mortgage, and was interested in the extinguishment of those liens, and, besides, appellant surrendered a note that might have been enforced against the land, or against the personal estate of appellee's husband, if there was any.

This note is not shown to have been a worthless thing, and we know of no rule of law or equity which will sanction her holding it, and recovering of appellant what she paid for it. It is not a sufficient answer to say that she was not legally liable upon the notes held by appellant, nor for the purchase-money for the land. She had the undoubted right to make the payments, and had the balance of the debt been paid, and the land saved, she doubtless would have been entitled to contribution from the heirs, as was told her by appellant and her son. The money was voluntarily paid, and money so paid cannot be recovered back. *Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312; *Worley v. Moore*, 77 Ind. 567; *Thompson v. Doty*, 72 Ind. 336. Had the balance of the purchase-money been paid and the land saved, the payments by appellee might have been a wise thing. As it turned out,

her payments proved to be a misfortune to her; but the courts cannot repair the many misfortunes which follow accidents, ill luck, ill health and bad judgment. • We are of the opinion that the evidence does not make, nor tend to make, a case against appellant for money had and received, and that for this reason the judgment must be reversed. Having reached this conclusion, it will not be necessary to indicate any opinion upon other and minor questions discussed by counsel.

Judgment reversed, with costs.

Howk, C. J., and ELLIOTT, J., dissent.

Filed Jan. 4, 1884.

3. CONSIDERATIONS AFFECTING A RECOVERY FOR A MISTAKE OF FACT.

(a) *The Defendant must have Money or its Equivalent which ex æquo et bono he may not retain.*

LADY CAVENDISH v. MIDDLETON.

TRINITY. KINGS BENCH, 1629.

[3 *Croke's Charles*, 141.]

ACTION upon the case. Whereas the said lady, by *Ralph Buck*, her servant, having bought of the defendant twelve beasts for fourscore pounds, paying for them twenty pounds in hand, and was to pay sixty pounds residue at the end of the month, which twenty pounds the said *Ralph Buck* immediately paid, and the sixty pounds residue he paid for the plaintiff to the defendant at the end of the month, and after died; that the defendant, after the said *Buck's* death, demanded of the plaintiff again the said sixty pounds, affirming it was not paid unto him: whereupon the plaintiff, *filem adhibens* to his assertion, paid unto him the said sixty pounds, *ubi reverâ* he had received it before: and upon this deceit the action was brought.

Serjeant CREW moved in arrest of judgment (after verdict upon not guilty pleaded, and found for the plaintiff), that this action lies not, but she ought to have brought an action of *account*, as for money unduly received.

BUT ALL THE COURT conceived, that the action well lies, although the plaintiff might have brought an action of account.¹ Whereupon it was adjudged for the plaintiff.

¹For the various steps by which *indebitatus assumpsit* won upon and overcame account and debt, see Mr. Ames in 2 Harv. L. R. 67.—ED.

DALE v. SOLLET.

KING'S BENCH, 1767.

[4 *Burrow*, 2133.]

THIS was an action for money had and received to the plaintiff's use: *non assumpsit* was pleaded: and issue joined.

CASE—The defendant, a ship-broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship: and did recover and receive £2000 for the plaintiff's use; and paid him all but £40, which he retained for his labour and service therein; which the witness (Mr. *Fuller*) swore he thought to be a reasonable allowance. And the jury were of opinion "that the defendant ought to retain £40 as a reasonable allowance." Consequently, the plaintiff was not entitled to recover.

The plaintiff objected, at the trial, "That the defendant could not give evidence in this manner, of his labour and service; but ought to have PLEADED it by way of SETT-OFF, or at least to have given notice of it as a *set-off*."

A verdict was found for the plaintiff: subject to the opinion of this Court: and if the Court should be of opinion against him, then judgment to be entered as upon a *nonsuit*.

Accordingly, on *Tuesday* last (the 10th instant), Mr. *Dunning* moved on behalf of the defendant, "that judgment might be entered against the plaintiff, as upon a non-suit:" and had a

RULE to shew cause.

Sir *Fletcher Norton*, on behalf of the plaintiff, now shewed cause; and insisted that the defendant ought either to have *pleaded* it, or given notice of a *sett-off*: but that he could not take advantage of it in *this* manner, *without* either plea or notice.

LORD MANSFIELD had no doubt of the defendant's being at liberty to give this evidence.

This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience (*V. ante*, *Moses v. Macferlan*, p. 1010, 1011, 1012) and equity entitled to: which can be no more than what *remains after deducting all just allowances* which the defendant has a right to retain *out of the very sum demanded*. This is not in the nature of a *cross-demand* or *mutual debt*: it is a CHARGE, which makes the *sum* of money received for the plaintiff's use so much *less*.

The two other JUDGES concurred.

Per CURIA.

JUDGMENT for the defendant, as on a NONSUIT.

FARMER v. ARUNDEL.

COMMON PLEAS, 1772.

[2 *William Blackstone*, 824.]

ASSUMPSIT for money had and received to the plaintiff's use, and for money lent and advanced, and for money laid out and expended by the plaintiff for the defendant. On *non assumpsit* pleaded and issue thereon, the case, upon trial at last Worcester Assizes before Mr. Justice NARES, appeared to be.—“That the plaintiff was overseer of Grimley, in Co. Worcester, and the defendant of St. Martin's, in Worcester city. That, in 1724, Richard Lamb was certified by the parish of Grimley to St. Peter's, in Worcester, or any other parish in the said city. On the 14th of March, 1771, a common order of removal was made by two justices to remove Lamb and his family from St. Martin's to Grimley. The defendant, meeting the plaintiff in the city of Worcester, produced the pauper and his family to him, and acquainted him with the order. Whereupon the plaintiff received the paupers; and the defendant then demanded payment of a bill of £8 9s. 10d. for the money expended by St. Martin's in maintaining the pauper and his family for the last four years, which the plaintiff accordingly paid. That the pauper still continuing in St. Martin's, another order of two justices was made on the 11th of September, 1771, for his removal, but in neither of the orders is any mention made of the certificate. To this order Grimley appealed, and the Sessions confirmed the same, but made no order for costs.” And this action is now brought to recover back this sum of £8 9s. 10d., which the plaintiff says he paid in his own wrong.

Walker, for the plaintiff, argued that the defendant, having no right to demand, had therefore no right to retain this money; that the pauper was not certificated to St. Martin's, but St. Peter's; and that, under stat. 8 & 9 W. 3, c. 30, the certificate must be to some particular place; that stat. 3, Geo. 2, c. 29 [s. 9], provides for reimbursing the expenses of certificated persons, to be liquidated by a justice of peace. This certificate is three years prior to that act, and that act recites that the expense could not then be recovered by law. The remedy pointed out by that act has not been pursued, even granting the certificate to extend to the parish of St. Martin's.

Burland, for the defendant, insisted, that the direction was surplusage; for certificates need not be directed at all (St. Nicholas Harwich and Wolferstan, Str. 1163); but when once delivered, it is satisfied, and cannot be used again. High and Low Bishopside; T. 28 Geo. 2, Burr. Settle. Cases, 381. That stat. 3 Geo. 2 extends to all removals subsequent to that act under certificates, whenever given, and that the justice is only to liquidate in case of a dispute, not where the

sum is admitted, as in the present case; that there are many cases where a man has no right to demand money, which yet (if voluntarily paid him) he may retain,—as debts of honor or gratitude, and bounties.

DE GREY, C. J. When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay he may by this action recover it back.¹ Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back,—as a *bona fide* debt, which is barred by the statute of limitations. Put the form of the certificate out of the case, it is however evidence, at all events, that the parish of Grimley have acknowledged the pauper to be their parishioner.

And it is allowed, that he has been maintained four years by the parish of St. Martin's. Admitting, therefore, that this money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of opinion that it is an honest debt, and that the plaintiff, having once paid it, shall not, by this action, which is considered as an equitable action, recover it back again.

GOULD, BLACKSTONE, NARES, Js., of the same opinion.

Judgment for the defendant.

MORRIS v. TARIN.

COMMON PLEAS OF PHILADELPHIA COUNTY, 1785.

[1 *Dallas*, 147.]

A CASE was made in this cause for the opinion of the Court, stating, that the Defendant bought a bill of exchange drawn by *Benjamin Harrison & Co.* upon a house in *France*, which was presented to the drawee in *February* 1784, and protested for *non acceptance*. Before it was presented, however, the drawee had become insolvent, and an *arrêt* was issued by the *French* government, prohibiting the institution of suits against him for a certain time. When the bill became due (the *arrêt* still continuing in force) it was again presented, and, on the 5th of *June* 1784, protested for *non payment*. Without any knowledge of the second protest, and without any suit or compulsion of law, the Plaintiff, who was one of the partners of

¹See the excellent little case of *West v. Houston* (1844) 4 Harrington, 170. *ante*, in note to *Mowatt v. Wright*, *ante*, 399, 405. And the principal case should be read in connection with the section on mistake of law, *ante*, 352-406. —Ed.

the company that drew the bill, repaid the Defendant the principal, interest and charges, *with 20 per cent. damages*: But, afterwards, conceiving that he had paid the 20 per cent. damages in his own wrong, he brought this action to recover back the amount.

The Court held the case under advisement till the 21st of *November*, when the President delivered their opinion as follows:

SHIPPEN, President. This is an action for money had and received to the Plaintiff's use. The facts are, that a bill of exchange was drawn on a house in *France* by *Benjamin Harrison & Company*, of which company the Plaintiff was one, in favour of the Defendant. or some other person who indorsed the bill to the Defendant. The bill being presented to the drawee, he refused to accept it, and a protest was made for non-acceptance—The bill with the protest was sent back, and the Plaintiff being applied to for payment, voluntarily paid the Defendant both principal and damages. This action is brought on an implied *assumpsit* to recover back part of the money, to wit, the damages, as paid by mistake; the Plaintiff contending, that to compel him to the payment of damages, there ought not only to have been a protest for *non-acceptance*, but likewise a protest for *non-payment*; and that having paid those damages, when by law he was not obliged to pay them, he ought in justice to recover the money back.

This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the Defendant ought to refund the money paid to him; but where the party might with a good conscience receive the money, and there was no deceit or unfair practice in obtaining it, although it was money which the party could not recover by law, this action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back again. The case of *Lowrey v. Bourdieu* in Doug. 452, and that of *Farmer v. Arundel* in 2 Black. R. 825, are full to this point.

In the present case the Defendant had presented the bill to the drawee for acceptance, and on refusal got it protested. Shortly after, and before the day of payment, an arrêt from the King of *France* prohibits the creditors of the drawee from suing him: upon which the bill was immediately sent back, and Mr. *Morris*, without waiting for a protest for non-payment, voluntarily takes up the bill and pays the damages. A protest for *non-payment*, however, appears to have been made in *France* before the money was paid by Mr. *Morris*, although he did not know it. The Defendant has acted with fairness, and lain out of his money, and might with a good conscience receive the legal damages.

The point of law principally agitated in this cause, whether a protest for non acceptance only, is sufficient to recover the money from the drawer, is not material to be determined in this action.

because, as it is voluntarily paid, and the Defendant might consistent with justice receive it, whether that point of law is for, or against the Plaintiff, we think he cannot recover the money back.

Judgment for the Defendant.

STRATON v. RASTALL AND ANOTHER.

KING'S BENCH, 1788.

[2 *Term Reports*, 366.]

THIS was an action of assumpsit for money had and received by the defendant (and one *William Avarne*, who was outlawed at the suit of the plaintiff) to the use of the plaintiff, and for money lent and paid; to which the defendant pleaded the general issue. At the trial at *Guildhall* at the Sittings after last *Michaelmas* Term, before *BULLER, J.*, a verdict for £425 was found for the plaintiff, subject to the opinion of the court on a case stated.

It appeared that defendant and *Avarne* were desirous of granting an annuity of £100 for their joint lives and the life of the survivor. The plaintiff agreed to and did actually purchase on *October* 23, 1780, the annuity for £575, and paid the said sum to defendant and *Avarne*, who receipted for the same, and gave a bond (with a warrant of attorney to enter up judgment) for £1150 to secure the payment of the annuity. By a contemporaneous indenture the defendant subjected the rents and profits of certain messuages, lands, etc., to the payment of the annuity in question.

Neither the bond, warrant of attorney nor indenture, was enrolled within the time prescribed by the statute respecting the grants of life annuities, whereby the same became void.¹

ASHHURST, J. I think the plaintiff may maintain this action. For wherever a man has received money upon a consideration which afterwards fails, that person from whom he received the money has a right to recover it back as money had and received to his use. Here the plaintiff has paid a sum of money on a consideration which has failed, and the only question is from whom he is entitled to recover it. I am of opinion that he is entitled to recover it either from the defendant and *Avarne*, or from either of them. Indeed it appears from the whole of this transaction that the plaintiff had no confidence in *Avarne*, but relied wholly on the defendant. *Avarne* had no property; it was the defendant who gave the security. That being the case, and the consideration having failed, is the plain-

¹Short statement substituted for the original report.—Ed.

tiff deprived of his remedy against the defendant because he understood that the money was originally raised not for the use of the defendant, but for that of *Avarne* only? The plaintiff had nothing to do with any private agreement between the defendant and *Avarne*; he advanced the money entirely or principally on the credit of the defendant. If the plaintiff had been asked whether he would have trusted *Avarne* only, he would have said no; the receipt imports it. As between these parties, both the defendant and *Avarne* received the consideration money; and the plaintiff shall not now be permitted to aver against his receipt.

BULLER, J. I am of opinion that the plaintiff cannot maintain this action against the defendant. It was clearly understood at the trial that *Avarne* in fact received the whole of the consideration money; and on this case it must be taken that the defendant was only a surety. I will first consider this as a question of strict law. On *Avarne's* proposing to raise a sum of money by way of annuity, offering the defendant as a surety, the plaintiff advanced the money upon the security of both for the payment of the annuity. Now on strict principles of law, if that contract become void by the act of the plaintiff, on what ground can he recover back that money; for the neglect of a plaintiff cannot raise a debt in a defendant. It formed no part of the contract; and if he can recover at all, it must be on equitable principles. But as against a surety, the contract cannot be carried beyond the strict letter of it. Then can the plaintiff recover against this defendant on equitable principles. Of late years this court has very properly extended the action for money had and received: it is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being considered like a bill in equity. And therefore, in order to recover money in this form of action, the party must shew that he has equity and conscience on his side, and that he could recover it in a court of equity. Then as to the equity in this case; it appears that the money was advanced for the use of *Avarne*, and that he only was benefited by it. But there is no equity in saying that a person, who has only lent his name by way of securing the payment of the annuity, shall be answerable for the consideration money of that annuity for which he has not pledged his security, and from which he has received no benefit whatever. Could the plaintiff recover this money against this defendant in a court of equity? The case which has been cited by the defendant's counsel is very strong to shew that he could not, and that equity distinguishes between the persons who join in a receipt and him who actually receives the money; and that the receipt is not conclusive against him, as he was only a surety and in fact received no part of the consideration money. In conscience, he only who received the money ought to be obliged to pay it back: and a court of equity would enquire in this case,

whether the party had received the money or not. Now if a court of equity would give this plaintiff no relief, we ought not to permit him to recover in a court of law in an action not founded upon equitable principle. So that whether this is considered as a question of strict law, or upon the equitable principles which have prevailed in actions for money had and received, I think the plaintiff is not entitled to recover.

GROSE, J., desired to have further time to consider of his opinion; and on *Monday, April 21*, he delivered it as follows. This is an action for money had and received. There has been no express promise made in this case; the action therefore, if it can be supported at all, must be founded on an implied one. The *prima facie* evidence of this is the receipt which was signed by the defendant jointly with *Avarne*, whereby they both acknowledged to have received the money. But this must be taken with all its concomitant circumstances; and from them it appears that the defendant, in consideration that the plaintiff would advance £575 for the benefit of *Avarne*, undertook with *Avarne* to become surety, and did become surety, for the payment of an annuity of £100; and accordingly a bond was entered into by both to that effect. By the subsequent neglect of the plaintiff that bond is become of no use. But the plaintiff says that, under these circumstances, the law implies a promise by the defendant to repay the money advanced as money received to the plaintiff's use. But no case has been cited to shew that under such circumstances the law implies such a promise. And in reality the money is not received by the defendant to the use of the plaintiff, nor lent to the defendant; but advanced to *Avarne* and the defendant for the benefit of *Avarne* in consideration of an annuity secured by bond to the plaintiff. Then it is neither money lent to be repaid, nor received for the use of the plaintiff. So that in strict law the evidence does not prove either count of the declaration. How stands the case then upon equitable principles. It appears plainly that in fact the defendant has had no benefit from this money. *Avarne* had the whole; then *Avarne* should be answerable for the whole. It is true that the defendant consented to become surety for *Avarne*, but he was surety for the payment of the annuity, and not for the repayment of the consideration money; and he entered into a security which the plaintiff has destroyed: but that raises no equity against the defendant who has received no benefit in favour of the plaintiff who is alone in fault. And therefore the action cannot be supported either upon legal or equitable grounds.

The *Postea* to be delivered to the defendant.

PLATT v. BROMAGE AND ANOTHER.

EXCHEQUER, 1854.

[24 *Law Journal*, 63.]

THIS was an action by the plaintiff as assignee of the estate and effects of John Jones, an insolvent. The first count was in trover, for converting the goods of the insolvent before his insolvency, and the second count was for money payable to the plaintiff as assignee, for money, received by the defendants, to the use of John Jones, before his insolvency. The defendants pleaded Not guilty, Not possessed, Leave and license, Never indebted, and other pleas.

At the trial before WILLIAMS, J., at the Breconshire Spring Assizes in last year, the facts appeared to be these:—In October, 1850, John Jones, the insolvent, a farmer residing at Llangoed farm, in the county of Brecon, being indebted to the defendants, Messrs. Bromage & Sneed, who were bankers at Brecon, in £660, for money advanced by them to him, assigned to them his stock, crops, etc., at Llangoed, by way of mortgage, for securing that sum and interest. Shortly afterwards, Jones took a smaller farm, called “Tregunter,” where he continued till September, 1852, when his difficulties increasing and the debt to the defendants being unpaid, the latter, with the consent of Jones, took possession of and sold the stock, crops, etc., at Tregunter, together with a quantity of wheat, to which he was entitled as outgoing tenant of Llangoed farm. It appeared probable that the insolvent had assented to the sale of his stock and crops on Tregunter farm, under the belief that the defendants were entitled to sell it under the assignment. Under these circumstances, it was contended, on behalf of the plaintiff, that he was entitled to recover in respect of the stock, crops, etc., in Tregunter, on the ground that they did not pass to the defendants under their assignment. The learned judge reserved the point, and the defendants had a verdict, leave being reserved to the plaintiff to move to enter a verdict for him.

J. Evans now moved accordingly (Nov. 7), and renewed the objection taken at the trial.

Per Curiam.¹ We will consult the learned judge who tried the cause.

Cur. adv. vult.

POLLOCK, C. B., now said: This was a case in which a rule was moved for by Mr. *Evans*. The facts were of this kind: The plaintiff, as assignee of an insolvent John Jones, claimed to recover certain effects sold to pay a debt due to the defendants, who were bankers at Brecon. The defendants, Messrs. Bromage & Sneed, had had assigned

¹POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

to them, to secure certain advances made by them, all the property in a certain farm called "Llangoed Farm;" the assignment also contained expressions sufficient to include future-acquired property; but that could not be done, the law not admitting of anything being assigned by deed, except that which actually exists. Then the defendants applied to have the security rendered available entirely with the consent of the insolvent: whereupon the property that was in the security was sold, and that not being sufficient, also a seizure was made upon another farm, called "Tregunter," entirely with the consent of the insolvent and the defendants, and this action is brought to recover in respect of so much property as did not pass by the deed between the parties. The point was reserved. We think there is no weight in the objection made on behalf of the plaintiff. If the insolvent assented to the act being done, it cannot be set aside, though it was proved that there was a mistake in point of law, or a mistake in point of fact: it is his doing, and he assented to it when it was done. There was a difference of opinion among the jury, whether or not he was under a notion that the property passed by the deed: I think it is quite immaterial whether he entertained that notion or not. There was no fraud. When a person does by some mistake that which he is in some respect bound to do, and perfectly competent to do, that cannot be treated as a fraud or as a mistake. If a man has two creditors, and, intending to pay one he by mistake pays the other, he cannot get the money back again. It appears to me and all the members of the court, that there ought to be no rule.

PARKE, B. I have consulted my Brother WILLIAMS on the matter, and he says, the consent of the insolvent to the sale of the other farm was probably influenced by the supposition on his part, that all future-acquired property, as well as all existing chattels, passed by the first assignment; and he left that question to the jury, who said they could not decide whether he made that assignment under the influence of the opinion that he was bound by the former assent. That is quite immaterial: he gave his consent uninfluenced by any fraud, and under a mistake of law; therefore, he must be bound by that mistake of law. On the question of the issue, I think the verdict was right.¹

Rule refused.

¹While it is true as stated in the principal case that future acquired property may not be assigned at law, equity permits and enforces mortgages of after acquired interests. See on this subject the following cases: *Holroyd v. Marshall* (1861) 10 H. L. C. 191; *Tailby v. Official Receiver* (1888) L. R. 13 App. Cas. 523; *Brett v. Carter* (1875) 2 Lowell, 458; *Pierce v. Emery* (1856) 32 N. H. 484; *Morrill v. Noyes* (1863) 56 Me. 458; *Platt v. N. Y. and Sea Beach Ry. Co.* (1896) 9 App. Div. (N. Y.) 87; *Smithurst v. Edmunds* (1862) 14 N. J. Eq. 408 (but compare for law holding, *Looker v. Peckwell* (1876) 38 N. J. L. 253). *Contra*: *Moody v. Wright* (1847) 13 Met. 17 (but see *Chase v. Denny* (1881) 130 Mass. 566). For the anomalous New York doctrine, see

BUEL v. BOUGHTON.

SUPREME COURT OF NEW YORK, 1846.

[2 *Denio*, 91.]

ERROR to the Onondaga C. P. Buel sued Boughton for money had and received to his use; and the case was substantially as follows: One Charlotte Smith held a bond against the plaintiff for \$2650, payable in six equal annual instalments, with annual interest from April 1, 1843. James H. Fuller, in right of his wife, owned and had an interest in the bond to the amount of \$498.10. On the first day of April, 1843, the plaintiff gave James H. Fuller his negotiable promissory note for said sum of \$498.10, having more than two years to run. The plaintiff agreed to make the note payable with interest; but interest was left out of the note by mistake in drawing it. On the day of the date of the note Charlotte Smith indorsed and receipted the amount of the note on the bond. On the day the note was given, James H. Fuller transferred it to Almerin Fuller, who indorsed the amount of the note on a bond which he held against James, which bond was on interest. This was done on the supposition that the note was also on interest. About twenty days afterwards Almerin Fuller transferred the note to the defendant, who indorsed the amount of the note, and of the interest which was supposed to have then accrued upon it, on a bond which he held against Almerin Fuller, which bond was on interest. On the 23d of May, 1845, the plaintiff paid the note to the defendant, and by mistake, supposing the note to have been written with interest, paid the defendant \$71.20 for interest on the note, and took it up. The plaintiff brought this suit to recover back the sum so paid by mistake for interest. The defendant set up the other facts which have been mentioned as an answer to the action; and the court decided in his favor. A verdict and judgment having passed for the defendant, the plaintiff now brings error on a bill of exceptions.

By the Court, BRONSON, C. J. This is a remarkable case. The plaintiff first omitted, by mistake, to make the note payable with interest, as he should have done: and then, by another mistake, he corrected the first error by paying interest, when the note itself imposed no such obligation. And thus by two blunders the parties have come out right at last. Or at least, the plaintiff has paid no more than

Kribbs v. Alford (1890) 120 N. Y. 519; Rochester Distilling Co. v. Rasey (1894) 142 N. Y. 570; Kirchwey Cases on Mortgage, 175; Central Trust Co. v. West Ind. Imp. Co. (1901) 169 N. Y. 314. On the general subject see Kirchwey's Cases on Mortgages, 40-109; Jones on Mortgages (6th ed.) §§ 153 *et seq.*; Bispham's Principles of Equity (7th ed.) chapter 8.—Ed.

he ought to pay; and there would be no ground for an action to recover back the money paid for interest, if the payment had been made to James H. Fuller, the payee of the note, against whom the first mistake was made. One party would in that case have paid, and the other received just what in justice and honesty ought to be paid and received.

But the payment was not made to James H. Fuller; and this leads me to notice that not only the plaintiff and James H. Fuller acted from beginning to end under the mistaken supposition that the note was made payable, as it should have been, with interest: but the note was twice transferred, and both Almerin Fuller and the defendant took it under the same mistake of supposing it carried interest. Now as against the plaintiff, James H. Fuller had an equitable claim to have the mistake corrected, so as to give him interest on the debt. Then Almerin, having taken and paid James for the note as though it were on interest, had an equitable claim to have the mistake corrected, so as to give the interest to him. The same thing is true as between the defendant and Almerin. The defendant took and paid him for the note as though it carried interest. And thus by a series of mistakes the equitable claim to interest which was originally in James passed from him to Almerin, and from Almerin to the defendant; so that, at the time the money was paid, the defendant was the person who was equitably entitled to receive it. He could not have sued the plaintiff for it at law in his own name; but in a court of equity the money would have been awarded to him, and not to James H. Fuller. It has come into the defendant's hands without suit, and from the person who ought to pay it; and I see no sufficient reason for requiring it to be refunded. Whether the defendant could sue at law in his own name to recover the money; or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions. This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a genral rule, the question is, to which party *ex aequo et bono* does the money belong; and in this case, I think it belongs to the defendant, who has got it. Let us suppose that the plaintiff had refused to pay the interest to the defendant; but, being liable to pay it to some one, he had paid it, either voluntarily or by compulsion, to James H. Fuller, between whom and the plaintiff the original mistake was made. James might then have been compelled to pay the money to Almerin; and Almerin to the defendant. Or if we begin at the other end, the defendant might have fallen back upon Almerin, and compelled him to correct the mistake by paying the interest; Almerin could have gone back in like manner upon James; and James upon the plaintiff. And so in any way of viewing the matter, the plaintiff was bound in equity and good conscience to pay the money; and the defendant was the man who in equity and good conscience was entitled to receive it. He has got it; and to

allow the plaintiff to recover it back, would be to make this the first in a circuit of four actions which would end in leaving the money just where it was at the beginning.

It is said that although the plaintiff has paid the interest to the defendant, he may be compelled to pay it again in an action on his bond to Mrs. Smith. But I think not. It fully appears that the principal sum of money for which the note was given belonged to James H. Fuller; and of course he was entitled to the interest which should afterwards accrue on that sum. If the indorsement made on the plaintiff's bond would not of itself preclude Mrs. Smith from recovering the interest in question, it would clearly be enough to show in addition, that the plaintiff had corrected the error by paying the interest. But if the plaintiff should succeed in recalling the money, then undoubtedly Mrs. Smith, on proving the mistake in giving the note, and that the plaintiff had not corrected it, might recover this interest for the benefit of James H. Fuller. But by leaving the money where it is, the whole series of mistakes will be corrected, and all parties, unless it be the plaintiff, will be satisfied.

Judgment affirmed.

JACKSON, RESPONDENT v. McKNIGHT, APPELLANT.

SUPREME COURT OF NEW YORK, 1879.

[17 Hun, 2.]

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover money alleged to have been paid to the defendant under a mistake of fact.

LEARNED, P. J. On the 23d of March, 1875, the defendant was the assignee and owner of a bond and mortgage executed by the plaintiff, which had become payable several years before. The interest had been payable annually on the tenth of September, and it had in fact been paid up to September 10, 1874. On the day first mentioned, the defendant stated to the plaintiff that \$230 of interest, payable September 10, 1874, were unpaid, and the plaintiff thereupon paid the defendant \$230 for such interest, not remembering, at the time, that the interest had been paid to that date. In January, 1876, the defendant assigned the bond and mortgage. After a lapse of two years the plaintiff sued to recover back this money as overpaid by mistake.

The difficulty is that, at the time when the plaintiff made this payment, he was owing the defendant a much larger amount, overdue and payable on the very obligation upon which this payment was made. Clearly, if the plaintiff had handed the defendant \$230 to apply on the bond and mortgage, he could not have recovered that sum back.

But in this present case he claims to recover, because it was intended as a payment of interest which had, in fact, been paid; and not as a payment of principal, which had not. The payment, however, was really made on the debt. The plaintiff is, and always will be, entitled to a credit for so much paid thereon. The defendant and the defendant's assignee can enforce the bond and mortgage only for what is payable, after crediting this and all other payments. In fact, over six months' interest had accrued at the time when this money was paid, payment of which (it would seem) might have been demanded, the principal being overdue. And further, after this money was paid and before the suit was commenced, even before the defendant assigned the bond and mortgage, interest accrued on the bond and mortgage more than this amount. How many subsequent payments were made is not shown.

The action to recover money paid by mistake is sustained, because otherwise the party would suffer an unjust loss. It should not be extended to cases where the relief is not necessary. It is not necessary in the present case, because the plaintiff can protect himself whenever he is sued on the bond and mortgage. Perhaps, in such suit, the holder of the mortgage may voluntarily give the plaintiff the credit to which he is entitled for this payment. Any questions between the defendant and his assignee, as to the defendant's liability on the assignment, they must settle among themselves.

The judgment should be reversed, a new trial granted, the reference discharged, costs to abide the event.

Present—LEARNED, P. J., BOARDMAN and BOCKES, JJ.

*Judgment reversed, new trial granted, reference discharged, costs to abide event.*¹

THE ILLINOIS TRUST AND SAVINGS BANK OF CHICAGO v. FELSENTHAL, ET AL.

APPELLATE COURT OF ILLINOIS, 1888.

[26 *Illinois Appellate*, 624.]

BAILEY, J. This was an action of assumpsit, brought by the Illinois Trust and Savings Bank of Chicago against Herman Felsenthal and others, for money had and received. At the trial before the court, a jury being waived, the issues were found for the defendants and judgment was entered in their favor for costs.

The money sued for was paid by the plaintiff to the defendants

¹See the elaborate criticism of the principal case in Keener's *Quasi-Contracts*, 52-59.—Ed.

upon two checks, dated October 6, 1885, drawn by Eugene E. Prussing on the plaintiff, one being for \$400, payable to the order of Charles Breyer, and the other for \$1,025, payable to the order of H. C. Zimmerman. Both of these checks were paid to the defendants through the Chicago clearing house, October 7, 1885, and at the time of such payment they bore what purported to be the indorsement of the payees therein named. It is now claimed, and the evidence tends to show, that said indorsements were not the genuine indorsements of said payees, but were written on the checks by or by the procurement of one Charles Hertel.

The facts in relation to said checks, as disclosed by the record, are substantially as follows: The plaintiff and defendants are bankers doing business in the city of Chicago, and are engaged in loaning money on real estate securities. Prussing, the drawer of the checks, is an attorney-at-law and at the date of said checks was acting for the plaintiff in negotiating and placing its loans. A short time prior to that date, Charles Hertel applied to Prussing for a loan of \$3,000, and offered as security a lot which he described as No. 177 Fremont Street, Chicago, and represented that there was a three-story building on said lot which he had just erected. Prussing referred Hertel's application for a loan to the plaintiff, and thereupon the plaintiff's president went upon the premises to examine the sufficiency of the security offered and reported to Prussing that it was sufficient. Prussing examined the title and found it good, and then prepared a note for \$3,000 and a deed of trust on said lot to secure the same, and on the 26th day of September, 1885, said papers were executed by Hertel, and on the same day the deed of trust was filed for record. On the 6th day of October, 1885, Prussing notified the plaintiff's cashier that he was ready to close the loan, and thereupon the plaintiff placed to Prussing's credit the sum of \$3,000 which was to be paid over to Hertel.

Before paying over the money, Prussing, as a matter of precaution, required Hertel to make an affidavit in relation to the building on said lot and the claims and liens of mechanics and material men thereon, in which Hertel stated that he was the owner of said lot and building; that he did the mason work therein himself and had paid for the labor and material pertaining to such work in full; that he let the carpenter work, painting, roofing and plastering to H. C. Zimmerman for \$2,500 and had paid him \$1,475 and that the sum of \$1,025 remained due said Zimmerman; that he let the plumbing and gas-fitting to Charles Breyer for \$400, all of which was still owing to him; that these two sums were all that owing on account of said building, and that he had received no notice of any lien on the premises from any source whatever.

After taking this affidavit, Prussing, at the suggestion of Hertel, drew his checks for the amounts of said claims, payable respectively,

to Zimmerman and Breyer, and expressed on the face of the checks that they were in full of all claims on account of said building, and delivered them to Hertel to be by him delivered to the payees therein named. Hertel, instead of delivering the checks to Zimmerman and Breyer, caused the names of said payees to be indorsed and then negotiated the checks to the defendants, who immediately collected them of the plaintiff through the clearing house, as already stated.

Shortly after the checks were paid it was discovered that the lot known as No. 177 Fremont Street had no building whatever on it, but that the building examined by the plaintiff's president was, in fact, standing on another lot. It follows that neither Zimmerman nor Breyer had any claim or lien on the lot mortgaged by Hertel to the Plaintiff, or to the moneys represented by said checks. Neither of them put any labor or materials into any building on the lot mortgaged, nor, so far as appears, into any building on any lot owned by Hertel.

It is plain from the foregoing facts, that, as between Hertel on the one hand, and Zimmerman and Breyer on the other, Hertel was the equitable owner of the moneys represented by said checks, and therefore the equitable owner of the checks themselves. They were given for money which he had borrowed from the plaintiff and for which he had given the plaintiff his note and deed of trust. He was owing Zimmerman and Breyer nothing, and they, therefore, had and could have no claim on said money or any portion of it. If Hertel had retained the checks in his own possession, they would have been powerless to compel him to deliver the same over to them. Nor can they have any claim upon the plaintiff based upon the checks, or upon the payment of them by the plaintiff without their indorsement.

Hertel, by selling and delivering the checks to the defendants, transferred to them his equitable title. We may entirely disregard the indorsement of the names of the payees, and treat such indorsements as mere forgeries. The rights of the defendants in that case are the same as though Hertel had sold them the checks without indorsement, which would have amounted to an equitable assignment. The defendants' equitable title to the checks gave them an equitable right to the moneys payable thereon, a right which they could doubtless have enforced by a proper proceeding. The plaintiff then having the defendants' money, which the latter were equitably entitled to receive, we see no ground upon which said money can be recovered back. The action for money had and received is an equitable action, and lies where a defendant has received money which *ex aquo et bono* he ought not to retain. In this case, however, the money in controversy belongs *ex aquo et bono* to the defendants, and it is, therefore, plain that the plaintiff's action therefor should not be maintained.

The judgment of the court is, in our opinion, the proper result to be drawn from all the evidence, and it will therefore be affirmed.¹

Judgment affirmed.

PORTER v. TULL.

SUPREME COURT OF WASHINGTON, 1893.

[6 Washington, 408.]

THE opinion of the court was delivered by DUNBAR, C. J.

This is an action for the recovery of lease money paid in advance according to the terms of the lease. The respondent, F. M. Tull, the owner and lessor of the leased premises, rented and leased to A. H. Porter and C. F. Jackson certain rooms and portions of the building known as the Tull block, in the city of Spokane. The lessees paid the stipulated rent according to the terms of the lease, monthly in advance, including the month of August, 1889. On the 4th day of August, 1889, the building was destroyed by fire, and Porter for himself, and as the assignee of Jackson, brings this action to recover from Tull the money paid in advance for the remainder of the month of August, 1889.

It is contended by the appellant that the authorities in this country fully sustain the proposition that when there is a total destruction of the subject-matter of the lease the rent shall be apportioned, and the tenant is no longer liable on his covenant. This proposition is conceded by the respondent so far as it applies to rent that is due for periods subsequent to the term for which the rent is paid in advance; but he insists that a distinction must be made here, and that inasmuch as the parties have contracted that the money must be paid in advance, it follows that they have apportioned the risk, or settled it between them; that the tenant assumes the risk of losing the rent for the time for which he has paid in advance, and the landlord assumes the risk of losing subsequent payments, besides the loss of his building.

We are unable to discover any real foundation in logic, law or justice for this distinction. The consideration, for which the lessee pays a monthly rent in advance, is not that he may be put in possession of the building for a day, or two days, or a week, but the real consideration is the use and possession of the building for a month. That is the valuable thing for which he contracts and for which he

¹See *U. S. v. Badeau* (1888) 130 U. S. 439, in which plaintiff failed to recover salary paid to a *de facto* officer, the court saying: "But inasmuch as the claimant, it not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money, which *ex æquo et bono*, he ought to return."—Ed.

parts with his money; and there is an implied contract on the part of the lessor to furnish him the use of the building for the time for which he pays for it. It cannot be presumed that because a lessee pays in advance that he has in contemplation the fixing of a different degree of liability in case of the destruction of the leased premises by fire; neither is it so intended by the lessor. It is simply a prudential requirement on his part to secure the rent, and to protect himself against the chances of losing it, and the inconvenience and trouble of collecting it. Conceding that the lessee is not liable for the destruction of the leased building for the remainder of the period for which the building was leased, there must be something more to warrant the presumption that the parties intended to establish a different degree of liability than the mere fact that the money was paid in advance. What difference can there be in principle, so far as fixing liability is concerned, whether the contract is to pay the rent monthly in advance or monthly at the end of the month?

Great stress is placed by respondent on the idea that the parties have made a positive contract, and that they are bound by its terms. The contract in one instance is as positive and binding as in the other, and the liability to pay at the end of the month is as much fixed by such contract as the liability to pay in advance is fixed by the contract, and the same reasoning that would prevent the recovery of the money paid in advance would compel the payment of the money under the other contract at the end of the month after the destruction of the building.

We are not cited to any adjudicated cases on this point. The reason probably is that no one has ever questioned the right of the lessee to recover money paid for that which he never received. We think the complaint states a good cause of action, and that the court erred in sustaining the demurrer. The judgment is reversed, and the cause remanded with instructions to overrule the demurrer, and to proceed in accordance with this opinion.¹

HOYT, ANDERS and SCOTT, JJ., concur.

STILES, J., dissents.

MATTLAGE v. LEWI.

COMMON PLEAS OF NEW YORK CITY AND COUNTY, 1893.

[6 *Miscellaneous Reports*, 150.²]

APPEAL by the defendant from a judgment of a District Court of the city of New York, rendered upon a trial before the justice thereof without a jury.

¹Contra: *Werner v. Padua* (1900) 49 App. Div. (N. Y.) 135.—Ed.

²Also reported in 26 *New York Supplement* 17.—Ed.

Action to recover moneys paid under a mistake. The facts are stated in the opinion.

GIEGERICH, J. The plaintiff, by mistake, paid to the New York Mercantile Exchange the annual dues on a ticket of membership thereof standing in the name of one W. B. Pope, and held by the defendant as collateral security for a loan. The defendant first learned of the mistake when he offered payment for the dues on said ticket to the superintendent of the said exchange, who informed him that he (defendant) could not pay them a second time, as they had been already paid by somebody else. Thereafter return of the amount paid by the plaintiff to the said exchange for such dues was demanded of the defendant, who refused to pay the same. This action was then brought. The defendant pleaded the general issue. Upon the foregoing state of facts the justice rendered judgment in favor of the plaintiff, and the defendant has brought this appeal. The judgment, in our opinion, cannot be sustained without a disregard of well-settled rules. In order to maintain an action for money paid under mistake it is not sufficient for a plaintiff to prove that he has conferred a benefit upon the defendant by reason of such mistake. It must appear that the defendant has actually received money, or that which the parties have treated as money. It is not sufficient that the defendant received a credit in account to which he is not entitled. *Keener Quasi-Contracts*, 139, and cases cited. See *Brundage v. Village of Port Chester*, 102 N. Y. 494. In the case at bar the money was not received by the defendant. The mistake was made by persons other than himself, and he did not in any manner contribute to the occurrence of the same.

Applying to this case the foregoing principles, it follows that the judgment should be reversed, and judgment absolute for dismissal of the complaint should be directed in favor of the defendant, with costs.¹

BISCHOFF, J., concurs.

Judgment accordingly.

¹See generally *Mayor of New York v. Erben* (1863) 10 Bosw. 189 (affirmed on appeal (1868) in 3 Abb. App. Dec. 255:); *Belden v. State* (1886) 103 N. Y. 1; *Franklin Bank v. Raymond* (1829) 3 Wend. 69; Compare *Bize v. Dickason* (1786), 1 T. R. 285, *ante* 353.

In *Patterson v. Prior* (1862) 18 Ind. 440, it was held and rightly that a person unjustly convicted and imprisoned (the court having no jurisdiction) might waive the tort and recover in assumpsit from anyone deriving a benefit from his services, as, for example, the lessee of the convict. In *Glass Iron & Steel Co. v. Harvey* (1897) 116 Ala. 656, likewise a convict case, this principle was lost sight of.—ED.

*(b) The Necessity of a Demand.*LEATHER MANUFACTURERS' BANK v. MERCHANTS'
BANK.

SUPREME COURT OF THE UNITED STATES, 1888.

[128 *United States*, 26.]

THE original action was brought December 7, 1877, by the Merchants' National Bank of the city of New York against the Leather Manufacturers' National Bank to recover back the sum of \$17,500 paid on March 10, 1870, to the defendant, the holder of a check drawn upon the plaintiff for that amount, with interest from June 20, 1877. The defendant, among other defences, pleaded the statute of limitations, and also that the plaintiff never demanded repayment or tendered the check to the defendant until long since the commencement of this action.¹

Mr. Justice GRAY delivered the opinion of the court.

The principal question argued is whether this action was barred by the statute of limitations of New York, by which any action upon a contract, obligation or liability, expressed or implied, except a judgment or a sealed instrument, must be brought within six years after the cause of action accrues. Code of 1855, § 91; Code of 1876, § 382.

The question then is whether, if a bank, upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money, or only after a demand for its repayment.

In order to avoid confusion in dealing with this question, it is important to keep in mind the difference between the liability of a bank to a depositor, and the liability to the bank of a person who has received money from it upon a forged check or order.

It is true that the liability, in either case, is that of debtor, not that of trustee or bailee; but there the resemblance ceases.

The specific money deposited does not remain the money of the depositor, but becomes the property of the bank, to be invested and used as it pleases; its obligation to the depositor is only to pay out an equal amount upon his demand or order; and proof of refusal or neglect to pay upon such demand or order is necessary to sustain an action by the depositor against the bank. The bank cannot discharge

¹The other facts of the case are omitted.—Ed.

its liability to account with the depositor to the extent of the deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check. If the bank pays out money to the holder of a check upon which the name of the depositor, or of a payee or indorsee, is forged, it is simply no payment as between the bank and the depositor; and the legal state of the account between them, and the legal liability of the bank to him, remain just as if the pretended payment had not been made. *First National Bank v. Whitman*, 94 U. S. 343.

But as between the bank and the person obtaining money on a forged check or order, the case is quite different. The first step in bringing about the payment is the act of the holder of the check, in assuming and representing himself to have a right, which he has not, to receive the money. One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Gurney v. Womersley*, 4 El. & Bl. 133; *Cabot Bank v. Morton*, 4 Gray, 156; *Aldrich v. Butts*, 5 R. I. 218; *White v. Continental Bank*, 64 N. Y. 316.

Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

Thus, in the early case of *Bree v. Holbech*, 2 Doug. 654, where an administrator received the amount of the mortgage money upon his assignment of a mortgage purporting to be made to the deceased, but in fact a forgery, of which both parties were ignorant, it was held by Lord MANSFIELD and the Court of King's Bench that the right of action to recover back from the administrator the money so paid was barred by the statute of limitations in six years from the time of the payment.

So, in *Utica Bank v. Van Gieson*, 18 Johns. 485, where a promissory note payable at the Bank of Geneva was left by the indorsers with the Utica Bank for collection, and sent by it to the Bank of Geneva

for that purpose, and the amount was afterwards paid by the Utica Bank to the indorsers upon the mistaken supposition that it had been paid to the Bank of Geneva by the maker, when in fact it had not, and it was not pretended that the Utica Bank had been guilty of any negligence, the Supreme Court of New York held that notice of the fact, that the note had not been paid by the maker was unnecessary to maintain an action by the Utica Bank to recover back the money from the indorsers; and Chief Justice SPENCER said: "The plaintiff's ground of action, then, is that the money was paid to the defendants under a mistake of facts. The defendants are not bailees or trustees of the money thus received. It was paid and received, as their money, and not as money to be kept for the plaintiffs. In such a case, it was not necessary to make a demand prior to the suit; for a request was not essential to the maintenance of the action; nor did the defendants' duty to return the money erroneously paid arise upon request."

In *Bank of United States v. Daniel*, the acceptor and indorsers, upon taking up a bill of exchange for ten thousand dollars, which had been duly protested for non-payment, paid ten per cent. as damages, under a mistake as to the local law upon the subject. Upon a bill in equity to relieve against the mistake and recover back the money, this court, while holding that such a mistake gave no ground for relief, also held that, if it did, the statute of limitations ran, in equity as well as at law, from the time of the payment, saying: "If the thousand dollars claimed as damages were paid to the bank at the time the bill of exchange was taken up, then the cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law." 12 Pet. 32, 56.

In *Dill v. Wareham*, 7 Met. 438, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice SHAW, held that a party receiving money in advance, on a contract which he had no authority to make and afterwards refused to fulfil, was liable to the other party in an action for money had and received, without averment or proof of any previous demand. And in *Sturgis v. Preston*, 134 Mass. 372, where land was sold for a certain sum by the square foot, and the purchaser, relying on the vendor's statement of the number of feet, made payment accordingly, and afterwards discovered that the number had been overstated, but disclaimed all charge of fraud or fraudulent concealment on the part of the vendor, it was held that the right of action to recover back the excess paid accrued immediately, without any previous demand, and was barred by the statute of limitations in six years from the date of the payment. See also *Earle v. Bickford*, 6 Allen, 549; *Blethen v. Lovering*, 58 Maine, 437.

The judgment of the Circuit Court in the present case appears to

have been based upon the decision in *Merchants' Bank v. First National Bank*, 4 Hughes, 1, which proceeds upon grounds inconsistent with the principles and authorities above stated, and cites no case except the very peculiar one of *Cowper v. Godmond*, 9 Bing. 748; S. C. 3 Moore & Scott, 219; in which the right of action to recover back money paid for a grant of an annuity, the memorial of which was defective, was held not to accrue until the grantor elected to avoid it on that ground, the annuity apparently being considered as not absolutely void, but as voidable only at the election of the grantor. See *Churchill v. Bertrand*, 3 Q. B. 568; S. C. 2 Gale & Dav. 548.

Although some of the opinions of the Court of Appeals of New York, in the cases cited at the bar, contain *dicta* which, taken by themselves, and without regard to the facts before the court, might seem to support the position of the defendant in error, yet the judgments in those cases, upon full examination, appear to be quite in accord with the views which we have expressed.

The cases of *Thomson v. Bank of British North America*, 82 N. Y. 1, and *Bank of British North America v. Merchants' Bank*, 91 N. Y. 106, were actions by depositors against their respective bankers, and were therefore held not to be barred until six years after demand.

In *Southwick v. First National Bank*, 84 N. Y. 420, the decision was that there was no such mistake as entitled the party paying the money to reclaim it; and in *Sharkey v. Mansfield*, 90 N. Y. 227, it was adjudged that money paid by mistake, but received with full knowledge of all the facts, might be recovered back without previous demand; and what was said in either opinion as to the necessity of a demand where both parties act under mistake was *obiter dictum*.

Two other cases in that court were decided together, and on the same day as *Bank of British North America v. Merchants' Bank*, above cited.

In one of them, the defendants, who had innocently sold to the plaintiffs a forged note as genuine, and, upon being informed of the forgery and requested to pay back the purchase money, had expressly promised to do so if the plaintiffs should be obliged to pay a third person to whom they had in turn sold the note, were therefore held not to be discharged from their liability to refund by the plaintiffs' having awaited the determination of a suit by that person against themselves, before returning the note to the defendants. *Frank v. Lanier*, 91 N. Y. 112.

In the other case, a bank, which had paid a check upon a forged indorsement, supposed by both parties to be genuine, was held entitled to recover back the money, with interest from the time of payment, necessarily implying that the right of action accrued at that time. *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74.

In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by the defendant

after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date. For this reason, without considering any other ground of defence, the order must be

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

Mr. Justice BLATCHFORD did not sit in this case, or take any part in the decision.

Mr. Chief Justice FULLER and Mr. Justice LAMAR were not members of the court when this case was argued, and took no part in its decision.¹

GILLETT v. BREWSTER.

SUPREME COURT OF VERMONT, 1890.

[62 *Vermont*, 312.]

GENERAL assumpsit. Heard on the report of a referee at the September Term, 1889, MUNSON, J., presiding. Judgment for the defendant. The plaintiff excepts.

The plaintiff had employed the defendant for two successive winters to cut and draw logs for him at an agreed price per thousand, and had paid him various sums from time to time. At the end of the second winter the defendant brought suit to recover the balance due, and the plaintiff paid him two hundred dollars "on account." Subsequently, becoming satisfied that there was in part an overpayment, he brought this suit for the excess. The referee found the fact of an overpayment, but that the plaintiff had never notified the defendant of his claim in this respect, or demanded repayment.

The opinion of the court was delivered by ROYCE, Ch. J.

The only question presented for our consideration in this case is, whether an overpayment, voluntarily made, through the mistake or negligence of the party making the same, and not induced by the fraud of the party receiving it, can be recovered back without a previous notice and demand.

¹See an elaborate note in 17 Am. St. Rep. 889, 898-899. See also *National Bank v. Spates* (1895) 41 W. Va. 27; *Sturgis v. Preston* (1883) 134 Mass. 372.

And see Judge KEENER's criticism of the principal case in his *Treatise on Quasi-Contracts*, 142-153.—Ed.

We regard the case of *Bishop v. Brown*, 51 Vt. 330, decisive of the question. It is there said: "If the mistake was induced by the fraud of the party receiving the same, and he had knowledge of the overpayment at the time, or if he had subsequently discovered the mistake, the duty was then cast upon him to rectify the mistake and repay the money. Thereafter he knowingly has the money of the other party to the transaction in his hands, which he holds against equity and good conscience, and there is no apparent reason for any demand for the repayment of the money before suit. But where the overpayment arises from the mistake or negligence of the party making it, and without the fault or knowledge of the party receiving it, it is reasonable that the party so receiving the overpayment should not be subject to a suit until he has been notified of the overpayment and called upon, and had a reasonable opportunity to rectify the mistake."

That the payment was expressed to be "on account," and not in final settlement, can make no difference with the rights of the parties, but serves only as evidence of the mistake or negligence of the party making the overpayment, in supposing that he was only paying on account, when in reality he was paying a larger sum than the whole amount actually due. Nor can it affect their rights that the amount of such payment was, at the time of suit brought, unascertained. No formal demand or of any specific sum is necessary. "Whatever language gives him (the defendant) notice of the overpayment, and calls upon him to rectify the mistake, is sufficient." "The money all the time is the property of the party making the overpayment, but having come into the possession of the other party without his fault or knowledge, he is entitled to be notified of the fact that he has the money in his possession, and to be called upon to rectify the mistake, before he is subject to a suit for the recovery." *Bishop v. Brown*, *supra*.

Judgment affirmed.

FULLER v. TUSKA.

CITY COURT OF NEW YORK. 1891.

[13 *New York Supplement*, 580.]

EHRLICH, C. J. The complaint alleges that the plaintiff loaned to the defendant 150 shares of the stock of the Chicago, Milwaukee & St. Paul Railroad Company, which the defendant failed to return, to plaintiff's damage \$744.35; that the defendant thereupon acknowledged an indebtedness to the plaintiff to that amount on the transaction stated, paid on account thereof \$1.30, leaving \$743.05 due. The

defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled at special term, and properly so. The complaint in substance shows that, after the defendant failed to return the borrowed stock, and acknowledged in consequence his liability in the form of an indebtedness for \$744.35, the plaintiff waives the tort, and sues upon the contract to pay this amount of money. No demand for the stock was necessary under such circumstances, and the commencement of the action is a sufficient demand for the money. The Code has done away with all technical rules of pleading, and nothing more need be alleged than is necessary to be proved. Code, § 518; Mann v. Morewood, 5 Sandf. 564; Glenny v. Hitchins, 4 How. Pr. 98; Plank-Road Co. v. Rust, 5 How. Pr. 390. And the complaint sufficiently sets out the cause of action. It follows that the demurrer was properly overruled, and that the interlocutory judgment must be affirmed, with costs.

BOWER ET AL. v. THOMPSON.

SUPREME COURT OF NEW YORK, 1892.

[19 *New York Supplement*, 503.]

APPEAL from Cayuga county court.

Action by M. E. Bower and another against Edwin B. Thompson for money had and received. From a judgment affirming a judgment for plaintiffs in justice court, defendant appeals. Affirmed.

Argued before DWIGHT, P. J., and MACOMBER and LEWIS, JJ.

DWIGHT, P. J. The action, so far as presented by this appeal, was for money had and received, being the sum of \$25 paid to the defendant by the plaintiffs a second time, by mistake of the latter. The only defence here suggested was the absence of a demand before action brought. Whether the defence was tenable depends upon whether the mistake was mutual and the overpayment innocently received by the defendant; or whether it was by mistake of the plaintiffs only, and the defendant knew at the time that he was receiving money to which he was not entitled. In the former case the obligation to refund did not arise until notice of the mistake and a demand of repayment (*Mayor, etc. v. Erben*, 3 Abb. Dec. 255; *Southwick v. Bank*, 84 N. Y. 430); in the latter it arose upon the instant the money was received. (*Sharkey v. Mansfield*, 90 N. Y. 228. The distinction and the reasons for it are obvious. In his opinion the learned county judge says the circumstances indicate to him that the case is governed by the authority last cited, "and that the defendant knew at the time of the settlement that he was receiving \$25 that he was not entitled

to." Such, it may be presumed, was also the effect of the testimony upon the mind of the justice; and the case is not one in which either the county court or this court should interfere with the conclusion of fact. That conclusion does no violence to the evidence, even as it appears more or less imperfectly reproduced in the return, while the justice had the advantage of hearing the full oral testimony of the parties and observing their appearance on the stand. And, the fact being found that the defendant knew at the time of receiving the overpayment that it was such, the case was within the second category above described, and no demand was necessary to recover the amount. The judgment appealed from must be affirmed.

Judgment of the county court of Cayuga county affirmed, with costs. All concur.¹

¹In *Martin v. Home Bank* (1899) 160 N. Y. 190, 201, it is said: "Nor was any demand upon the defendant for the payment of the money necessary before this action was commenced. The defendant was not a bailee or trustee that had rightfully become possessed of the money, but a party that had consciously received what did not belong to it. The defendant received and held the money as its own, and the duty to restore it arose at the moment it was received, and existed at all times thereafter. *Sharkey v. Mansfield*, 90 N. Y. 227, 229."

The cases on the subject of demand as a prerequisite to recovery are not numerous, due to the fact, it would seem, that a demand is ordinarily made before beginning legal proceedings.

An English case frequently cited is *Freeman v. Jeffries* (1869) L. R. 4 Ex. 189, but in this value of the leasehold assigned was determined by experts, and the valuation—although certain items were omitted—was really in the nature of a compromise. The question of demand was therefore *obiter*, although it was argued and carefully considered by the court.

For American practice, the following cases will probably suffice: *Taggart v. Trevanny* (1891) 1 Ind. App. 339; *Baldwin v. Hutchinson* (1893) 8 Ind. App. 454; *Bogle v. Gordon* (1888) 39 Kas. 31; *Willis v. French* (1892) 84 Me. 593; *Walker v. Bradley* (1825) 3 Pick. 261; *Gould v. Emerson* (1894) 160 Mass. 438; *Northampton National Bank v. Smith* (1897) 169 Mass. 281; *Deaver v. Bennett* (1890) 29 Neb. 812; *Mayor of N. Y. v. Erben* (1863) 10 Bosw. 189 (on appeal, 1868, 3 Abb. App. 255); *Reid v. Supervisors* (1891) 14 N. Y. Supp. 595; *Leach v. Vining* (1892) 18 N. Y. Supp. 822; *Wyckoff v. Curtis* (1894) 7 Misc. (N. Y.) 444; *Hamer v. Brainard* (1891) 7 Utah. 245; *Stoddard v. Chapin* (1843) 15 Vt. 443; *Brainerd v. Champlain Transp. Co.* — (1857) 29 Vt. 154; *Bishop v. Brown* (1879) 51 Vt. 330; *Varnum v. Highgate* (1893) 65 Vt. 416.

In several of the above cases, the question of the running of interest before and after demand is discussed.—ED.

(c) *The Effect of a Change of Position by Either Party.*

KER v. RUTHERFORD.

COURT OF SESSIONS OF SCOTLAND, 1684.

[*Morison's Dictionary of Decisions*, 2928.]

A DEBTOR, who had paid to the obtainer of a decret of furthcoming, and got his discharge, being thereafter decerned at the instance of an assignee, whose assignation had been intimated before the arrestment, pursued the arrester upon the warrandice in his discharge.

Alleged for the defender: He could not be liable, seeing *suum recipit*, and the pursuer had not obtruded, as he ought, the anterior intimation of the assignation, during the process of furthcoming; which, if he had done, the arrester would have secured himself against the other estate of the common debtor, who is now become bankrupt.

The Lords sustained the allegiance, and assoilzied.

Fol. Dic. v. 1. p. 186. Harcarse, (ARRESTMENT.) No. 81. p. 15.

DUKE OF ARGYLE v. HALCRAIG.

COURT OF SESSIONS OF SCOTLAND, 1723.

[*Morison's Dictionary of Decisions*, 2929.]

ARCHIBALD EARL OF ARGYLE, *anno* 1672, granted bond to Mr. John Ellies for 5000 merks; who, of the same date, gave a back-bond, declaring, "That he had a bond from Donald and Ronald Campbells, for £2250 Scots, whereof if he received any part, he obliged him, his heirs, &c. to allow the same in payment of the 5000 merks." This bond of 5000 merks, coming by progress into the person of the Lord Halcraig, the late Duke of Argyle granted corroboration thereof, narrating, "That in regard this sum was by progress in the person of the Lord Halcraig, therefore he obliges himself to pay the same." All this while, the back-bond was entirely unknown, either to the late or present Duke, till July 1715; at which time, by payment made, and imputing the sums contained in Donald and Ronald Campbell's bond, the 5000 merks bond was not only extinguished, but a considerable sum over *indebite* paid; whereupon a process was intended against the Representatives of the late Lord Halcraig, concluding an ex-

tion of the bond, and repetition of £1277 Scots, paid over and above what was really due.

It was *pleaded* for the defenders, *1mo*, That the Duke corroborating the bond in the Lord Halcraig's person, and expressly obliging himself to pay, was bound to the assignee by his own contract; after which the assignee needed not be concerned, whether any part was paid to his cedent or not; *2do*, If the debtor was ignorant of the back-bond, and of any payments made to the cedent, *sibi imputet*; it is more just, the original creditor's representatives being now bankrupt, that the debtor, whose business it was to know, should suffer by his ignorance, than the assignee: The assignee, in taking the corroboration, took all reasonable precaution for his security; and he had thereby reason to rely upon his assignation, as absolutely good, and free of all exception.

Answered to the *first*; It is in vain to plead upon the corroboration, which in no view can import a more express acknowledgment of the assignee's title, than the actual payment that was made to him; and therefore, since a *condictio indebiti* is competent, when payment is made *indebite, errore facti*, which was truly the case here, the Duke not having known of the back-bond, it will not be the less competent that a corroboration intervened: And the reason of both is the same, corroboration and payment are neither of them absolute unqualified acknowledgments of the creditor's title; they go upon the supposition, that the title is otherwise well-founded; if which prove false, whatever is built thereupon must fall to the ground. To the *second answered*, If the original creditor's representatives are bankrupt, that naturally falls upon the assignee, whose faith he followed, and not the debtor. The debtor truly made twice payment, and has a *condictio indebiti*, well-founded thereby against the assignee; which action cannot be taken from him, unless the assignee will qualify some fault, some negligence of the pursuer's, which yet cannot be done, by reason that the back-bond truly had fallen aside long before his time; and he was no way negligent as to that matter. And if they ascribe this effect to the pursuer's inculpable ignorance, then it must follow in general, "That a debtor can never obtain a *condictio indebiti*, if the cedent became insolvent any time after the payment, of which repetition is sought:" a position that is apprehended to be without any foundation in law: For, as inculpable ignorance is never reckoned sufficient to bear out an action of damages for reparation; as little to bear out an exception of damages, in order to take away an action that is otherwise competent.

Replied to this *last*; It is sufficient to qualify that the loss happened through the ignorance and error of this pursuer: For, since one of them must bear the loss, it is more equitable that it fall upon the pursuer, who was in an error, than the defender who was in none; and no body ought to be prejudged by another's errors.

The Lords sustained the defence, That after the assignation to the Lord Haleraig, the late Duke of Argyle did corroborate the bond assigned in the person of the said Lord Haleraig, relevant to assoilzie the defender from any repetition or extinction.

Fol. Dic. v. 1. p. 187. Rem. Dec. v. 1. No. 39. p. 78.

BULLER v. HARRISON.

KING'S BENCH, 1777.

[*Cowper*, 565.]

UPON shewing cause why a new trial should not be granted in this case, Lord MANSFIELD read his report as follows:

This was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of £2100 paid him as due upon a policy of insurance, as *agent* for the insured, Messrs. *Ludlow and Shaw*, resident at *New York*. This sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on the 20th of *April*. Part of the money was paid at that time, and the remainder on the 6th of *May* following; on which day the defendant passed the whole sum in his account with Messrs. *Ludlow and Shaw*, and gave credit to them for it against a sum of £3000 in which they stood indebted to him. On the 17th of *May*, notice was given by the plaintiff to the defendant that it was a foul loss. At this time, nothing had happened to alter the situation of the defendant, or to make it different from what it was on the 20th of *April*. He had accepted no fresh bills, advanced no sum of money, nor, given any new credit to his principals; but affairs between them and him remained precisely in the same situation as on the 20th of *April*. The question at the trial was, whether this action could be maintained against the defendant, as *agent* of the insured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before stated, was equivalent to a payment of it over.

In general the principle of law is clear; that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it: because it is just, that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to

his principal, without making himself liable to the real owner for the amount. But the present case turns upon this; that the agent was precisely in the same situation at the time the mistake was discovered, as before. At the trial I inclined to think the plaintiff ought to recover; but did not direct the jury; and they found for the defendant. I am satisfied I mistook in leaving it open to the jury: For it is clearly a question of law, not a matter of fact: And in conscience the defendant is not entitled to retain the money. Therefore I should have left it to the jury in this manner; if you are satisfied that the money was paid by mistake, and the defendant's situation not altered by any new circumstance since, but that every thing remained in the same state as it was on the 20th of *April*, you ought to find for the plaintiff.

Mr. *Bearcroft* and Mr. *Davenport* showed cause.

Mr. *Wallace* and Mr. *Dunning* were in support of the rule; but Lord MANSFIELD thought the case so clear, that his lordship stopped Mr. *Dunning*, as being unnecessary to give himself any trouble.

LORD MANSFIELD. I am very glad this motion has been made: for I desire nothing so much, as that all questions of mercantile law should be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is. The jury were embarrassed on the question whether this was a *payment over*. To many purposes it would be. It is now argued, that this is not a *mere placing to account*, but a *making rest*. If it were, it would not vary the case a straw. I verily believe the jury were entangled in considering it as a payment over. There is no imputation upon a man who trusts to a misrepresentation of the insured. It is greatly to his honour; but it makes it of consequence to him to know, how far his remedy goes if he is imposed upon. The whole question at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal. And in the case of *Muilman v. —*, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not. In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of *April*. What then is the case? The defendant has trusted *Ludlow and Co.* and given them credit. He traffics to the country where they live, and has agents there who know how to get the money back. The plaintiff is a stranger to them and never heard of their names. Is it conscientious then, that the defendant should keep money which he has got by their misrepresentation, and should say, though there is no

alteration in my account with my principal, this is a bit, I have got the money and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment: But here no prejudice at all is proved, and none is to be inferred. Under these circumstances I think (and Mr. Justice ASTON with whom I have talked the matter over is of the same opinion) that the defendant has no defence in point of law, and in point of equity and conscience he ought not to retain the money in question.

Mr. Justice WILLES and Mr. Justice ASHHURST were of the same opinion.

Per. cur. Rule for a new trial absolute.

SKYRING, ADMINISTRATOR OF G. SKYRING v. GREENWOOD AND COX.

KING'S BENCH, 1825.

[4 *Barnewell & Cresswell*, 281.]

ASSUMPSIT for money had and received by the defendants to the use of G. Skyring in his life-time and to the use of the plaintiff, as administratrix since his death. Plea, general issue.

At the trial before ABBOTT, C. J., it appeared that the defendants were paymasters of the Royal Artillery and had given credit in account to an officer in that corps, the late Major Skyring, from the 1st January, 1817, to the 5th November, 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th August, 1806, to an officer in the situation of the late Major Skyring, and a statement of that account was delivered to him in 1821.

In December, 1816, the defendants were informed by the board of ordinance that the increased pay granted by the order of 1806 would not be allowed to officers in the situation of Major Skyring. The defendants, however, did not communicate this information to Major Skyring until 1821, and subsequently to that time, they continued to receive his pay.¹

ABBOTT, C. J. It is not necessary to decide in this case, whether the defendants by reason of their character of paymasters are estopped, by the account which they have rendered, from saying that there was a mistake in it. The opinion which I entertained at the trial was founded on a particular fact in this case, and that opinion remains

¹This statement is taken principally from the headnote to the case.—ED.

unaltered. The defendants, as paymasters, received sums from government generally on account of the corps, and an order having been issued for an increase of pay, they rendered an account to Major *Skyring* in 1821, in which they gave him credit for the increased pay to which they supposed him to be then entitled, and upon that account there appeared to be due to Major *Skyring* a balance of £116 9s. 7d. If he had drawn a bill upon them for that amount, it probably would have been paid, and if they had paid the money, it is quite clear that they could not afterwards have recovered it back, on the ground that according to the true construction of the order it was not due to Major *Skyring*; and if the defendants could not have recovered it back, they ought not now to be allowed to set it off. The defendants afterwards continued to receive further sums on account of Major *Skyring*, and the money so subsequently received by them must be considered as paid off, if they are entitled to bring back into the account the sums which they had given him credit for, in respect of the increased pay. The particular fact in this case upon which my judgment proceeds is, that the defendants were informed in 1816 that the Board of Ordnance would not allow these payments to persons in the situation of Major *Skyring*, but they never communicated to him that fact until 1821, having in the mean time given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance; but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the defendants have not merely made an error in account, but they have been guilty of a breach of duty, by not communicating to Major *Skyring* the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him on account.

BAYLEY, J. This may be a case of hardship upon the defendants, but they have brought it upon themselves. This is an action for money had and received. If the defendants are entitled to set off the sum they claim, the action is not maintainable. From the year 1816 to 1821 the defendants had given credit for certain sums, as if Major *Skyring* was entitled to them. I think they were guilty of

a neglect of duty in not communicating to him the information they had received from the Board of Ordnance in 1816. Suppose that the balance of the account delivered in 1821 had been paid to Major *Skyring*, and that no subsequent pay had been received for his use by the defendants, and that they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such; and if they could not recover the money back, neither ought they now to be allowed to retain other monies belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they suffered him to consider his own for a long period of time. I think they cannot now be permitted to say, that the money which they allowed him in account as money received by them to his use, was not money received to his use. The rule for a new trial must therefore be discharged.

HOLROYD, J. The present action is brought for money had and received by the defendants to the plaintiff's use, subsequently to the communication made by the Board of Ordnance to the defendants, and of which the deceased was not informed till 1821. The plaintiff has a right to recover, unless the defendants have a debt to set off. Now Major *Skyring* had a right to expect that money belonging to him would be received by defendants for him, and that all payments made by them were on account of monies so received by them. Suppose that *Greenwood* and Co. had paid Major *Skyring* the balance of the account in 1821, and that no money belonging to him had come subsequently to their hands, they could not have recovered that money back, on the ground that they had paid it to him under a mistaken notion that he was entitled to it. A payment, therefore, made under such circumstances, would not create a debt between the defendants and Major *Skyring*. Here, it is true, the defendants did not pay the balance. But they now say, that some of the money which they paid to Major *Skyring* was not paid to him, on account of monies received for him by them, but was paid by them under the mistaken notion that he was entitled to it, and, therefore, that such payment constituted a debt from Major *Skyring* to them, which they are now entitled to set off; but I think, for the reasons already given, it did not constitute a debt, and that being so, the plaintiff is entitled to recover.

Rule discharged.

NEWHALL AND ANOTHER v. TOMLINSON AND ANOTHER.

COMMON PLEAS, 1871.

[*Law Reports, 6 Common Pleas, 405.*]

ACTION for money had and received, money paid, interest, and money found due upon accounts stated. Plea, never indebted.

The cause was tried before WILLES, J., at the last assizes at Liverpool. The facts were as follows: The plaintiffs and the defendants were respectively cotton-brokers in Liverpool. In April, 1870, the plaintiffs bought of the defendants 74 bales of cotton ex *Glen Cora*, each acting for principals whose names were not disclosed, and, according to the usage of the cotton-market, each treating the others as principals in the transaction. Weight-lists of the cotton were in the ordinary course delivered to each party from the warehouse-keeper at Albert Dock; but a clerk of the defendants made a mistake of 100 cwt. in adding up the figures, and the consequence was that when the plaintiffs paid for the cotton they paid the defendants too much by £509 15s. The mistake was not discovered until the 14th of December, when the plaintiffs demanded back that sum. The invoice for the cotton (which was delivered on the 22d of April) was headed as follows: "Messrs. Newall & Clayton, bought from W. D. Tomlinson & Co." etc.; and it was not until after the discovery of the mistake that the plaintiffs were informed (as the fact was) that Messrs. Dixon & Co. were the defendant's principals.

In the meantime the defendants, being creditors of their undisclosed principals and holding the goods as security, credited their principals with the amount received from plaintiffs.

The learned judge, before whom the case was tried, directed the jury to find for the plaintiffs, damages £509 15s., reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the court should think the ruling wrong.

Quain, Q. C., moved accordingly.

BOVILL, C. J. The defendants in the first instance personally claimed the price of the cotton from the plaintiffs as upon a sale to them by the defendants, each being, as between themselves, personally bound as principals in the transaction, though each were acting for principals whose names were not disclosed. The invoice was made out as upon a sale from the defendants to the plaintiffs, and claiming the price as being due to the defendants personally; and each were liable personally to the others for the due performance of the contract. The defendants were entitled to sue for and recover the price of the cotton in their own names, and to apply it when received to their own use and benefit. They had made large advances to their

principals, Messrs. Dixon & Co., upon the security of the cotton, and were entitled to sell it to recoup themselves. In no sense could they be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co.; nor did they in point of fact hand it over to them. It is true that the defendants were shown to have made further advances to Messrs. Dixon & Co. subsequently to the receipt by them of this money. That, however, could not make it money had and received by Messrs. Dixon & Co. to the use of the plaintiffs, so as to enable them to sue Messrs. Dixon & Co. for it. The mistake originated with the defendants themselves, and they alone are responsible. The cases relied on are clearly distinguishable. In *Shand v. Grant*, 15 C. B. N. S. 324 the defendant received the money as agent of the shipowner, and for the purpose of handing it over to him. The case was put entirely upon the ground that the defendant was a mere agent. He had handed over the money to his principal, and the principal was the proper person to sue. So, in *Holland v. Russell*, the same view was taken, and the decision proceeded upon the ground that the defendant was a mere agent. *COCKBURN, C. J.*, in delivering the judgment of the court below, after stating what had been the contention on one side and on the other, says (1 B. & S. 424, at p. 432; 30 L. J. Q. B. 308, at p. 312): "We are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such made to him the payment of the money he now seeks to recover back." And, when the case came before the Court of Error, the same view was taken. *ERLE, C. J.*, delivering the judgment of that court, says (4 B. & S. 14, at p. 15; 32 L. J. Q. B. 297, at p. 298): "The defendant who received this money from the plaintiff received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal, under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." Here the defendants were not mere agents. They were dealing as principals, and entitled to apply the proceeds of the sale of the cotton to their own use. For these reasons I am of opinion that the direction of the learned judge was right, and that there should be no rule.

BYLES, J. I entirely agree with what has fallen from my Lord upon the first point. The defendants did not receive the money as mere agents: they received it for their own use and benefit. In addition, I would observe that the defendants here are seeking to excuse one mistake by another. They paid over (or accounted for) the money to their employers, if not with recollection, yet with notice of the facts. If they were mere agents, they were bound to remember. On both grounds, therefore, I think the verdict was right.

MONTAGUE SMITH, J. I am of the same opinion. Upon the facts appearing, the defendants were not mere agents to receive the money for Dixon & Co., and to hand it over to them. They received it on their own account, and had a right so to receive it and to appropriate it to their own use. They were not mere conduit-pipes: they were in some sense principals, and had a right to appropriate the money in satisfaction of their advances to Dixon & Co., and they did so. What is said by Lord MANSFIELD in *Buller v. Harrison*, 2 Cowp. 568, seems to me to be very much in point: "The law," he says, "is clear, that, if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal: and in the case of *Muilman v. ———*, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not." If the argument of Mr. *Quain* were to prevail, the defendants clearly would be in a better position than if the mistake had not happened. They received the money and appropriated it towards satisfaction of their own debt. I think the defendants were not, to use the words of ERLE, C. J., in *Holland v. Russell*, 4 B. & S. 16, agents altogether. As between themselves and the plaintiffs, they were principals.

BRETT, J. I am of the same opinion. The defendants were originally liable because under a mistake they received money which they were not entitled to. They cannot get rid of that liability, unless they bring themselves within the rule as to an agent who has received money on account of his principal and has paid it over to him. It seems to me that they have failed to bring themselves within that rule. They did not receive this money for their principals. They stood with regard to the plaintiffs as original contractors. I should be sorry, however, to decide the case on that ground alone. The money in question was received by the defendants, not only as between the plaintiffs and themselves, but also as between Dixon & Co. and themselves, on their own account, and not on account of Dixon & Co. Being under advances, they had a right to sell the cotton and receive the proceeds on their own account. They cannot, therefore, say that they received the £509 15s. in question to the use of their principals; and consequently they do not bring themselves within the rule

relied on. I will only add that I found my judgment entirely upon that view, and I do not rely on the ground that the money was received by the defendants through a mistake of their own.¹

Rule refused.

CLARK v. ECKROYD.

COURT OF APPEAL OF ONTARIO, 1886

[12 *Ontario Appeal Reports*, 425.]

THIS was an appeal by the defendant from the judgment of the Common Pleas Division, reversing the judgment of WILSON, C. J., at the trial, and directing judgment to be entered for the plaintiffs.

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. Clark & Co.," instead of "H. E. Clark & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid the defendants' draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the amount paid—some \$335.92—which the defendant refused.²

Neville, for the appellant.—It may safely be asserted here that but for the culpable negligence of the plaintiffs the loss which has occurred would not have arisen. The plaintiffs are compelled to admit that notice of the consignment of the goods to them had been sent and received, yet although thereby the responsibility was cast upon them as the purchasers and consignees of the goods to apply to the railway company they entirely neglected such simple duty. The plaintiffs are thus shewn to have been guilty of gross negligence, which

¹The principal case and *Durrant v. Ecclesiastical Commissioners* (1880) L. R. 6 Q. B. D. 234 (the facts of which are sufficiently given in *Clark v. Eckroyd*, *post*) are usually cited as establishing the doctrine that change of position on the part of the defendant is no bar to plaintiff's recovery. They certainly are opposed to the earlier cases on the subject, such as *Cocks v. Masterman* (1829) 9 B. & C. 902. This line of cases is, however, distinguishable in that a positive duty is incumbent upon the plaintiff to notify the defendant in order that the latter may not lose his rights against other parties to the instrument. In the absence of a duty, then, mere negligence would seem no longer to bar plaintiff's right to recovery, even although defendant is prejudiced. See also *Stanish v. Ross* (1849) 3 Ex. 527, 533, per *PAIKE, B.*—Ed.

²Statement of the case is taken from the head note, and the argument for the respondents is omitted.—Ed.

had they not been guilty of the loss could not have occurred. By the conduct of the plaintiffs in giving their acceptance and payment of the draft of the defendant for the price of the goods so sent the defendant was misled into believing that all was right, by reason of which he was lulled into security, in consequence of which he has lost all right to call on the carriers for the price of the goods. Under these circumstances, although all was done under a mistake of fact, still, as defendant cannot be restored to his original position, he has a right to look to the plaintiffs for indemnity. *Shand v. Grant*, 15 C. B. N. S. 324; *Bullen v. Henderson*, 2 Cowp. 365; *Freeman v. Jeffries*, L. R. 4 Ex. 189; *Watson v. Moore*, 33 L. T. 121; *Cocks v. Masterman*, 9 B. & C. 905; *Addison on Contracts*, 8 Ed. 1040; *Campbell on Negligence*, 69.

Geo. Kerr, for the respondents.

January 12th, 1886. *OSLER, J. A.* The general rule is fully discussed in the notes to *Marriott v. Hampton*, 2 Sm. L. Cas. 421, and is well settled, viz., that a person may recover back money which he has paid to another under a mistake, as to the existence of the fact on which his liability to pay it depended, however careless he may have been in omitting to use due diligence to inquire into the fact, provided he did not mean to waive all inquiry. *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477.

The rule is usually subject to the further qualification, that the person who received the money must not through the neglect or misconduct of the person who paid it be placed in a worse position than if he had *not* paid it.

It is on the latter ground mainly that the defendant contests his liability, though he also now makes the point that the present action at all events must fail, because there was no previous demand of repayment.

As to this objection, in *Kelly v. Solari*, *PARKE, B.*, said: "A demand may be necessary in cases in which the party receiving the money may have been ignorant of the mistake."

And in *Freeman v. Jeffries*, L. R. 4 Ex. 189, 200, *BRAMWELL, B.* puts it thus:

"If the plaintiff were, under the circumstances, entitled to be repaid the sum he claims, he ought to have given notice to the defendant, of the facts, by reason of which he was so entitled, because until he did so there could be no duty on the defendant to pay it over."

In the present case I think it quite sufficiently appears from the evidence that this at least was done.

The defendant was told of the mistake and how it occurred, and there appears to have been an attempt to compromise the matter. Had it been intended to rely on this objection it should have been expressly taken at the trial, where any doubt upon the subject could have been at once cleared up. It is too late to insist upon it now.

As to the principal ground of defence I agree with the decision of the Common Pleas Division. That the money was paid by the plaintiffs under a *bonâ fide* mistake of fact as to the goods having been received by them, and that such mistake was not discovered until after they had been sold by the railway company cannot be doubted. The case is therefore *prima facie* within the general rule, and I see great difficulty in holding that it comes within the exception relied on by the defendant.

It can only do so if the negligence, of which the plaintiffs were undoubtedly guilty, was in respect of some legal duty they owed the defendant.

This is illustrated by the case of *Cocks v. Masterman*, 9 B. & C. 905, where the plaintiffs, who were bankers, paid a bill purporting to be accepted by their customer, and having discovered, on the following day, that the bill was forged, gave notice of the fact to the party to whom they had paid it. It was held that they could not recover back the money they had paid on the bill, because the holder was entitled to know on the day the bill became due whether it was honored or dishonored, and that the defendants by their negligence in paying it without satisfying themselves of the genuineness of the acceptance, had deprived the holder of his right or privilege of taking proceedings against other parties to the bill on the day of its dishonor.

To the same effect is the case of *Smith v. Mercer*, 6 Taunt. 86.

The defendant put his case on the ground of estoppel, urging that the plaintiffs misled him into the belief that the goods had been received, and thus prevented him from making inquiries which would have led to their recovery, before the railway company could have sold them.

In *Swan v. North British Australasian Co.*, 2 H. & C. 175-182, BLACKBURN, J., speaking of the rule as to estoppel, by negligence, and referring to the judgment of WILDE, B., in the court below, points out that "he omits to qualify the rule he had stated, by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into the mistake; and also that it must be the neglect of some duty that is owing to the person led into that belief, or what is the same thing, to the general public, of whom that person is one, and not merely the neglect of what would be prudent, in respect to the party himself or even of some duty, owing to third persons, with whom those seeking to set up estoppel, are not privy."

See also *Dickson v. Reuter's Telegraph Co.*, 3 C. P. D. p. 1, per BRAMWELL, L. J., "Before any person can complain of negligence, he must make out a duty to take care; and that duty can only arise in one of two ways, either by contract, or by the law imposing it."

In *Durrant v. The Ecclesiastical Commissioners*, 6 Q. B. D. 234, the plaintiff by mistake had paid the defendants who were owners of the tithes of a parish, tithe rent charged in respect of lands which

were not in his occupation. He did not discover his mistake until the two years limited by law for the recovery of a tithe rent charge had expired, and the defendants had lost their remedy for the arrears against the lands actually chargeable. It was argued that the plaintiff ought to have known the facts, and that his laches had altered the position of the defendants; but it was held that there was no duty cast on the plaintiff in relation to the defendants, which made his delay in discovering the mistake, laches on his part and that he was entitled to recover.

What legal duty then did the plaintiffs owe the defendant in the present case? If, as I think, there was none at the time the draft was accepted and the money paid, none would arise afterwards, short of the time when the mistake was actually discovered.

The defendant believed he had sent the goods, and said so: the plaintiffs believed they had received them and, in effect, said so too; for the defendant's case may be put as high as that. Both were mistaken, but the plaintiffs in saying so were neither inviting the defendant to act, nor to refrain from taking action about the goods, for nothing was then known to them, which made it their duty at their peril, to be accurate: in other words which made it their duty to take care, more than if the goods had never left the defendant's warehouse, and the subsequent loss had occurred by reason of their being burnt, or stolen, or injured there from any cause before the discovery of the mistake. That it was not discovered sooner may have been negligence, but it was negligence in relation to the plaintiffs' own business, negligence in relation to something which would have been prudent, in respect to the plaintiffs themselves, but not of any duty they owed to the defendant.

The origin, and real cause of the loss was the defendant's own neglect in mis-sending the goods. On the decisions referred to the judgment is right, and the appeal should be dismissed.

BURTON, J. A. I agree in affirming the judgment upon the question of estoppel, and in addition to the cases referred to by my Brother OSLER would refer to the case in this Court of the Agricultural Saving Association v. Federal Bank, 6 A. R. 200, where the same question was fully considered.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

*Appeal dismissed, with costs.*¹

¹The authorities on this subject are in confusion, and abound in dicta more or less relevant and more or less sound.

For cases on this subject in the Federal and State Courts, see 15 Am. & Eng. Encyc. of Law (2d ed.) 1106, 1107 and notes.

For the Scotch law on this question, see 3 Green's Encyc. of Scots Law (article *Condictio indebiti*) 170.

For the Continental law on the subject of payment by mistake due to plaintiff's negligence, when a recovery would prejudice the defendant's legal

(d) The Effect of Plaintiff's Negligence.

KELLY v. SOLARI.

EXCHEQUER, 1841.

[9 Meeson & Welsby, 54.]

ASSUMPSIT for money paid, money had and received, and on an account stated. Plea, *non assumpsit*. At the trial before Lord ABINGER, C. B., at the London sittings after Trinity term, it appeared that this was an action brought by the plaintiff, as one of the directors of the Argus Life Assurance Company, to recover from the defendant, Madame Solari, the sum of £197 10s. alleged to have been paid to her by the company under a mistake of fact, under the following circumstances.

Mr. Angelo Solari, the late husband of the defendant, in the year 1836 effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November, the actuary of the office informed two of the directors, Mr. Bates and Mr. Clift, that the policy had lapsed by reason of the non-payment of the premium, and Mr. Clift thereupon wrote on the policy, in pencil, the word "lapsed." On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th, applied at the Argus office for the payment of the sum of £1000, secured upon

rights, see: French Code Civil (Daloz) Arts. 1376, 1377; Baudry-Lacantinerie & Barde's *Traité de Droit Civil: Des Obligations*, vol. iii., part 2, pp. 1063-1077; Italian Civil Code (French translation of Prudhomme) Art. 1146; Spanish Civil Code (edition of Falcon) Art. 1899. The cited editions of the Italian and Spanish Codes are annotated with references to the various holdings of the Continental and Spanish-American countries, including Louisiana (Civil Code, Arts. 2270-2290). These provisions, differing somewhat in formal expression, are all based upon Articles 1376, 1377 of the French Code. The Spanish text is fuller and may serve as a model: "A person shall be exempted from the obligation of restitution, who, believing in good faith that the payment was made on the account of a legitimate and subsisting credit, destroys the title or has allowed the action to be prescribed, or has abandoned the pledge, or cancelled the warranties of his right. A person who has unduly made a payment can only address himself to the true debtor or to the sureties with regard to whom the action may yet be enforced." (The translation is taken from Walton's Civil Law in Spain and Spanish-America.)

For the provisions of the Roman law and the present law on this subject in Germany, see 2 Windscheid's *Pandektenrecht* (8th ed.) § 426, and the various notes thereto, and references to the *Bürgerliches Gesetzbuch*, § 814.—ED.

the policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a cheque for £987 10s., which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances, the Lord CHIEF BARON expressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference; and he accordingly directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him for the amount claimed.

Lord ABINGER, C. B. I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to: for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of *Bilbie v. Lumley*, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action: but as Mr. *Platt* certainly has a right to have that question submitted to the jury, there must be a new trial.

PARKE, B. I entirely agree in the opinion just pronounced by my Lord CHIEF BARON, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Mr. Justice BAYLEY, in the case of *Milnes v. Duncan*; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it. But I agree that Mr. *Platt* has a right to go to the jury again, upon two grounds: first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events; in which case I quite agree that they could not recover it back.¹

Rule absolute for a new trial.

¹In *Townsend v. Crowdy* (1860) 8 C. B. N. S. 477, plaintiff bought out a partner for a price, subject to a deduction, in case profits fell off. He paid without deduction, not having discovered, as if careful he might have done, that profits fell off. On action for money had and received to the plaintiff's use, it was held that plaintiff's negligence was no bar to his recovery.

"It seems, from a long series of cases, from *Kelly v. Solari*, 9 M. & W. 54, down to *Dails v. Lloyd*, 12 Q. B. 531, that, where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time

PERRY v. NEWCASTLE MUTUAL FIRE INSURANCE CO.

QUEEN'S BENCH OF UPPER CANADA, 1853.

[8 *Upper Canada Q. B.* 363.]

ASSUMPSIT—common counts—money paid—money received, and on account stated.

Plea: Non-assumpsit.

The plaintiffs insured their mill with the defendants for three years, from the 1st of September, 1848, to the 1st of September, 1851—paying at the time £12 10s., and 5s. for the policy. In 1849 they paid further £50 on account of their premium note for £250 which they had given according to the statute. They did not pay this £50 to the defendants in cash, but by a note given by one of the plaintiffs for discount and indorsed by a third party, and which was taken up when due. These payments were made to satisfy assessments made by the company on the premium note, according to the act, and were made in July and October, 1849.

The policy, dated the 1st of September, 1848. was given by the clerk of the company to one of the plaintiffs; it had the seal of the company to it, and the signature of their secretary, but not of the president—which omission of the president's signature the secretary swore at the trial was accidental—and he stated that when he gave the policy either to one of the plaintiffs or to some one for them, he believed that he requested that they would call on the president to get it signed by him.

The defendant's counsel, at the trial, contended that the policy be-
of the payment have had means of knowledge of which he has neglected to avail himself."—ERLE, C. J.

"No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But, since the case of *Kelly v. Solari*, 9 M. & W. 54, it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry. Upon the facts of this case, I think the plaintiff is entitled to recover."—WILLIAMS, J.

"This is the simple case of one paying another money which both at the time suppose to be due, but which afterwards turns out, in consequence of a mistake of fact on the part of the payer, not to have been really due. In such a case the law clearly is that the money may be recovered back. The only distinction is between error or mistake of law, for which the payer is responsible, and error or mistake of fact, for which he is not."—WILLES, J.

For the doctrine of the principal case, compare *N. Y. Life Ins. Co. v. Statham* (1876) 93 U. S. 24, and *Keener's Quasi-Contract*, 52.—Ed.

ing under the seal of the company and countersigned by their secretary, was binding upon them; and that at any rate the plaintiffs could not recover back money voluntarily paid on a contract entered into by them, having the policy in their own possession, and being therefore, as must be presumed, aware of any defect apparent on the face of it.

Verdict for the plaintiff, £67 18s.¹

Vankoughnet obtained a rule to enter a nonsuit on points reserved at the trial; or for a new trial on the law and evidence, and for misdirection.

ROBINSON, C. J. delivered the judgment of the court.

We are of opinion that the rule nisi for nonsuit in this case should be made absolute, but not from any doubt whether the policy was or was not binding upon the company, being without the president's signature; for we think it clear that it was not in itself binding on account of that omission.

The 19th clause of the 6th Wm. IV. ch. 18, when it provides "that any policy signed by the president and countersigned by the secretary *but not otherwise*, shall be deemed valid and binding on the company," makes the signatures of both those officers necessary to its validity—and it cannot be denied that the plaintiffs have been holding a policy since the 1st of September, 1848, which they could not directly enforce by an action at law; it does not therefore follow, however, that they can support this action to recover back money which they have paid on account of the premium note given under the statute. If they were resisting the payment of any further sum on account of the note until a binding policy had issued, or because that which had been issued was not binding—that would raise a different question, as was explained in the case of *Bell v. Gardiner*, 4 M. & Gr. 11, which was cited by the plaintiffs' counsel in the argument, but which in its general bearing is unfavorable to the plaintiffs' recovery under the general circumstances of this case.

The general principle is clear, that when a person has paid a sum of money to another, with a full knowledge of facts, he cannot sue for it back again on the ground that he paid it in ignorance of the law, resulting from these facts. As was stated by the court in *Bell v. Gardiner*, the inference seems almost irresistible that the plaintiffs, having such means of knowledge as they had in this case, must have been aware of the fact that the policy which they themselves held had not the president's signature. And besides, it was sworn by the person who gave the policy to one of the plaintiffs, that he believed he mentioned to him that he must call and obtain the president's signature. Still we must admit it to be possible that this witness may have been mistaken in supposing that he stated this, and possibly also

¹The statement of the case is much shortened.—Ed.

that the plaintiffs might have been able in some way to prove to the satisfaction of a jury that they in fact were not aware that the president's signature was wanting. And if the jury had been so convinced, and had found the fact, then as respects that point in the case, it would have stood on similar ground with the case of *Bell v. Gardiner*. But here we have the fact that the plaintiffs had the most ample means of knowledge of the defect when they paid the money, and no ground is furnished for questioning that they did in fact know it. We have not therefore any foundation to rest upon for the distinction which the court took in *Bell v. Gardiner*; and there is besides this other difference on which the Court then laid great stress, that it was an action in which the defendant was setting up want of consideration or failure of consideration as a defence against a demand—not a case in which a party having made a payment with full means of knowledge in his power, was suing to recover back again the money which he had so paid.

The case of *Hentig et al. v. Staniforth*, 5 M. & Sel. 122, cited by the plaintiffs' counsel in this case, does not apply, because there, when the plaintiffs paid the money, it was expected that a license for the voyage would be obtained in time to make the voyage legal; and by accident the license was delayed so long that it became inoperative, for the ship had sailed without it. The voyage was consequently illegal, and no action could have been sustained on the policy. The assured was allowed to recover back his premium, but that was because there was a failure of consideration by reason of something happening after the payment, and not known at the time of the payment, which wholly frustrated the object.

The case of *Oom et al. v. Bruce*, 12 Ea. R. 225, was a case standing on the same ground, and equally inapplicable to the circumstances of the case now before us. The case of *Lucas v. Worswick*, 1 Moo. & Rob. 293, and of *Kelly v. Solari*, 9 M. & M. 54, are more to our present purpose; for they are both cases of exceptions to the general principle that money paid with knowledge of the facts, or with such means of knowledge as would raise *prima facie* a presumption of knowledge, cannot be recovered back.

The justice of the decision in *Lucas v. Worswick* is clear; and one is glad to find that the court felt itself at liberty to draw the distinction which was drawn in that case—namely, that a party may recover back money which it is clear he must have paid in *forgetfulness* of certain facts which had without doubt been known to him.

The plaintiff there having a claim made upon him for work and labor for £142, contended that he was only liable for £97; but as the defendant pressed for some money on account, he paid him £20 10s., leaving the question as to the full amount of the claim open for future discussion. The defendant afterwards agreed to give up the disputed part of his account and accept the £97 in full, and the plain-

tiff then paid him £97—not at the moment thinking of the £20 10s. which he had already paid on account. He soon became sensible of his mistake, and demanded back the £20 10s. which he had thus paid twice over; but the defendant insisted on retaining it. It would be a reproach to our law if under such circumstances the payment could not be recovered back, though undoubtedly it was money paid with a knowledge of the fact, but amounting to the same as want of knowledge of it at the moment. The knowledge was not present at the time, and no man could doubt that the payment must have been forgotten; for the plaintiff could never have intended to pay the same sum a second time. It was therefore a case for an exception manifestly proper to be made to the general principle that money paid with knowledge of the facts cannot be recovered back. It was most unconscientious in the defendant to desire to retain the money. Here it seems as unconscientious in the plaintiffs to desire to get the premium back—at least till they had gone to the defendants and ascertained that they were inclined to evade the obligation by withholding the president's signature from the policy. That should have been first put to the test.

It is not easy for us to determine whether the plaintiffs when they paid the £50 (for as to the £12 10s. that payment by the very provisions of the charter was required to be made before the policy was perfected) were under the impression that the policy would be binding if it had only the corporate seal; or whether they paid the money in reliance that the company would raise no difficulty about it, as they had been long insured with them, and the same risk had been again clearly accepted and agreed to be continued; or whether the plaintiff meant to have the defect supplied, and merely omitted it from that disposition to procrastinate which often occasions a thing to be neglected from the feeling that it can be done at any time. In either case the plaintiffs could not demand the money back; and the only question that would remain with us would be whether, as in the case of *Kelly v. Solari*, 9 M. & W. 51, there should not be a new trial, in order that the jury might find expressly whether the money was paid with a knowledge of the facts and in consequence of the plaintiffs' waiving the defect in the policy under any such impressions as I have mentioned, or whether they paid it in actual ignorance that the president's signature was wanting, or forgetting that circumstance when they made the payment, supposing them to have known it before.

As to the latter point, we can see no ground on which it could properly have been left to the jury to have assumed the case to be so, in the absence of any evidence. In *Lucas v. Worswick*, 1 Moo. & Robb. 293, no one could have imagined otherwise than that the plaintiff must have forgotten the previous payment when he paid the whole money a second time.

But the plaintiffs' counsel admitted fairly enough on the argument of this rule, that there was really no pretence for ordering a new trial, since no new light could be thrown on the case by any evidence in the power of the parties to give. And, as it stands upon the evidence, we think the plaintiffs must fail: for—first, as they had the policy all the time in their own possession, it ought not to be assumed without any evidence whatever leading to such a conclusion, that they did not know in what condition the policy was in regard to its execution. Then, secondly, if they had even noticed the defect for the first time after they had paid the £50, they should at least have gone to the defendants and given them an opportunity to repair the defect before they made it the ground of demanding back their money. And thirdly—which indeed is conclusive of itself against this action—the plaintiffs cannot be said to have paid their money for nothing, since the company were in fact bound to execute a policy, having accepted the risk and received the money. Their own by-law, as they rightly insisted in answer to this demand, made them clearly liable. It is usual with insurance companies to accept the premium and give a temporary receipt, which binds them in case of a loss happening before the policy is drawn out; and it is necessary that this should be the case, especially in cases like the present of renewed or continued insurance, for otherwise a person might be ruined by a fire occurring within the short time that must elapse before the formal instrument can be prepared and executed.

I do not consider that the company could in this case have escaped from their liability, after what has taken place; for if they were disposed to be dishonest, they could surely be compelled to execute a valid policy of the proper date, and their by-law would estop them from objecting that it was not in fact executed before the loss.

In effect, therefore, the plaintiffs have been all the time insured, as they probably have considered themselves to be, notwithstanding the accidental omission of the president's name, which they have had no reason, as it appears, for apprehending would not be made right upon their request at any time.

Per Cur.—Rule absolute for entering nonsuit.¹

¹See further of this question of payment by mistake, with means of knowledge at hand: *Guild v. Baldridge* (1852) 2 Swan, 295; *Columbus Ins. Co. v. Walsh* (1853) 18 Mo. 229; *National Life Ins. Co. v. Jones* (1873) 1 Thompson & Cook, 466 (affirmed in 59 N. Y. 649); *Windbiel v. Carroll* (1878) 16 Hun, 101; *Frambers v. Risk* (1878) 2 Ill. App. 499; *West v. Houston* (1844) 4 Harrington, 170, as note to *Mowatt v. Wright*, *ante*, 406.

In *Merchants' National Bank v. National Eagle Bank* (1869) 101 Mass. 281, 285, GRAY, J., speaking for the court, said: "It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact. And though the rule was originally subject to the limitation that it must be

THE STANLEY RULE AND LEVEL COMPANY v. BAILEY.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1878.

[45 *Connecticut Reports*, 464.]

ASSUMPSIT, to recover back money claimed to have been paid under a mistake of facts; brought to the Court of Common Pleas of Hartford County. The facts were found by a committee, and on the facts the court (McMANUS, J.) rendered judgment for the plaintiffs. The defendant brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

PARK, C. J. We think the finding of the court below, that the money sought to be recovered in this suit was paid by the plaintiffs to the defendant through misapprehension of the facts with regard to their obligation to pay it, is decisive of the case. It is conceded that the plaintiffs are entitled to recover a part of the amount, and we think it is equally clear they ought to recover the whole. That part of it which is in dispute was paid to the defendant as a royalty for the privilege of manufacturing and selling certain articles, under certain patents, of which the defendant previous to this time was the owner. The money was paid according to the terms of a certain contract between the parties, wherein the defendant, for the consideration of a certain royalty to be paid on all the articles covered by the patents which should be manufactured and sold by the plaintiffs, granted them the privilege of manufacturing and selling them during the continuance of the patents and any extension of them. The plaintiffs manufactured and sold the articles, and paid the royalty according to the terms of the contract. In the meantime some of the defendant's patents expired and were not extended, but the plaintiffs being ignorant of the fact continued to pay the royalty as they had done before, and paid the sum which they now seek to recover on patents which had thus expired. The defendant knew that the patents had expired and had not been renewed at the time he received the money; but believing that he had the right to receive it under the contract, did not state the fact to the plaintiffs.

It further appears that the plaintiffs paid the money believing that the patents were in force, and that they would not have paid it had

shown that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such case is not precluded from recovery by laches in not availing himself of the means of knowledge in his power. It is otherwise if the money is intentionally paid without reference to the truth or falsehood of the fact, and with the intention that the payee shall have the money at all events. *Appleton Bank*, 4 Gray, 520; *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowley*, 8 C. B. N. S. 477."

See also *Lawrence v. American National Bank* (1873) 54 N. Y. 432.—Ed.

they known the facts. But it is said that they had the means of knowledge, and that this is equivalent to knowledge itself. There may be such full and complete means of knowledge as to be equivalent to knowledge itself, but we think this is not such a case. The defendant owned the patents. He was in the employ of the plaintiffs. The patents were on a large number of articles; and some of them were covered by two or more patents of different dates. The case was a complicated one, and required thorough examination to determine the exact fact. It would naturally be expected that the defendant would keep himself informed on the matter, and being in the employment of the plaintiffs would inform them when the patents expired. This would reasonably be expected by the plaintiffs where they had no reason to suspect dishonesty in the defendant; and we think they had a right to rely on what would ordinarily be expected under the circumstances.¹

It is further claimed that, whatever might otherwise be the right of the plaintiffs to repayment, they have lost the right, inasmuch as they made a voluntary payment of the royalty on articles covered by the remaining patents, after they had become apprised of the fact that they had paid the royalty on patents which had expired. This claim is made upon the idea that the last payment made the first payment voluntary, although it was not so originally. But a payment is either voluntary or involuntary at the time it is made, and nothing can occur afterwards to alter its character in this respect. As well might it be claimed, if A. sues B. upon a note, and B. has a claim against A. for work done at his request, that unless B. sets off his claim against A.'s demand he thereby acknowledges that he has no claim, and cannot afterwards recover it. This claim is clearly without foundation.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

(c) *Defense of a Purchase for Value.*

EARL OF MAR v. EARL OF CALLANDER.

COURT OF SESSIONS OF SCOTLAND, 1673.

[2 *Stair's Decisions*, 866.²]

THE Earl of *Mar* pursues the Earl of *Callander* to repeat a part of the Sum of 6000 merks payed by him, and his Chamberlains to *Callander*, more than was due, in so far as he having been due to the Laird of *Glorret* by Bond 6000 merks of Principal, one of his

¹A portion of the opinion relating to the construction of the contract has been omitted.—Ed.

²Likewise reported in *Morison's Dictionary of Decisions*, 2927.—Ed.

Chamberlains had payed 1000 merks thereof to *Gloret*, and a subsequent Chamberlain, not knowing of the former, payed to *Callander*, as Assigney by *Gloret*, the whole Sum, Principall, and Annual, so that the 1000 merks was twice payed, and was *indebite solutum* to *Callander*, it having been payed before to his cedent. It was answered for *Callander*, That *Gloret* being Debitor to him in the like Sum, he had for his satisfaction, assigned him this Bond, so that he having received no more from *Mar*, than what was due to him by *Gloret*, he was not obliged to repeat what he had received, in solution of a just Debt, for *repetitio nulla est ab eo, qui suum recipit, tametsi ab alio quam vero debitore solutum est. L. 44. ff. de Condictione indebiti*, and *L. 2. Cod. eodem solutrix delegatione repetitio nulla est contra delegatum, sed contra delegantem, licet sit ex errore solutum*, so that *Callanders* Assignment from *Gloret* to *Mars* Bond, in satisfaction of a Debt due by *Gloret*, is a Delegation of *Mar*, *Glorets* Debitor, in place of *Gloret* himself, and therefore there can be no repetition of what was payed by *Mar* through error against *Callander*, though it may justly be against *Gloret*, seing *Callander* has received nothing by the payment of his true Debt, which is according to our ordinar custom, that if any make payment of another mans Debt, upon that Debtors Precept, he can never Repeat it upon pretence, that it was *indebite solutum*, and that he payed by error, when he was not due, and an Assignment being but a Procuratorie *in rem suam* is in the like case. It was answered, That as the Earl of *Mar* might have excluded *Callander*, before he got payment, as to this 1000 merk payed to his cedent before his Assignment, so having payed, what was not due, he may justly repeat it, as it was found in the Case of *Sir James Ramsay* against *Robertson*, the 10 Jan. 1673, where *The Lords* decerned *Robertson*, to repeat what he as *Executor* Creditor had recovered from *Ramsay*, upon finding of a discharge of the Debt; and here the payment was not made by the Earl, or by his Warrant, but by the error of his Chamberlains. It was Replied, That what was payed by *Ramsay* to *Robertson* was not voluntar, but by a Transaction upon a depending Process, but voluntar payment, of what was due to a Creditor, though the Payer was not Debitor, can never be repeated, whether it were payed by the Earl, or by his Chamberlains, or any other.

The Lords found *Callander* obliged to repeat, if he had acquired the Assignment, for payment of a Sum whereby he was in the same Case as his cedent, and was not a Creditor as to what was payed before his Assignment, but found it relevant, That his Assignment was in satisfaction of a Debt due to him by *Gloret* before the Assignment, equivalent to the Sum assigned; So that he got no more from *Marr*, or his Chamberlains, but what was due to him by *Gloret*.

CATHCART v. MOODIE.

COURT OF SESSIONS OF SCOTLAND, 1804.

[*Morison's Dictionary of Decisions, App. Heir and Exr. 2.*]

MR. WILLIAM ANDERSONE having been the man of business for Lord Rockville's family, was considerably indebted to them at the time of his death (Dec. 1796), when he nominated Mr. Stuart Moodie, advocate, to be his executor.

The account due to the Countess Dowager of Dumfries, Lord Rockville's widow, amounted to £1054 15s. and as there was then supposed to be much more than a sufficiency of funds for the discharge of his whole debts, payments were made to the amount of £986 5s. 8d. so as nearly to extinguish this debt.

It having turned out, however, that Andersone's funds were inadequate to answer the demands upon him, Moodie raised a summons of multiplepounding (4th June 1798), in which it was agitated, whether Lady Dumfries should rank upon the debt as at Mr. Andersone's death, or as then outstanding; that is, whether the payments were to be held as dividends out of the interest belonging to Lady Dumfries in the funds, or if she should now rank for the difference between the sum originally due, and the payments made in extinction of it.

Mr. Moodie contended, That the whole creditors, after their debtor's decease, are constituted into an aggregate body, for whose behoof the executor is trustee: That therefore he has no right to apply the funds to the payment of one creditor more than to another: Although he cannot make any such selection, still it is held that he may pay *primo venienti*; but this cannot be to any one making a private extrajudicial demand, but can only be to the person who first obtains a decree; Ersk. B. 3 T. 9. § 43. This was not the case here. The payment, therefore, was unwarrantable and there must be room for a *condictio indebiti*. For although it may be true, that there was a debt truly due at first, there was none due by the the executor, in so far as the funds turn out insufficient. The payment was made by mistake, and therefore not protected by the *bona fides* of the creditors. Carrick v. Carse, 5th August 1778, No. 11, p. 2931.

Lady Dumfries having assigned her interest to Robert Cathcart, writer to the Signet, as her trustee, in his name argued: A creditor having obtained payment from an executor, where no diligence has been used for six months after the death of the debtor, is not liable in any claim for repetition, though an insufficiency of the the funds may afterward be discovered. A debt which is not disputed may be paid in this way without any decree. The claim of repetition cannot be supported upon the idea of a *condictio indebiti*, which implies a want of title

in the receiver, or ignorance of some plea in point of fact or law on the part of the payer. Neither of these can be alleged here. The debtor might have obtained decree against the executory funds for the debt, and, when paid, no claim in the way of *condictio* would be competent. *Robertson v. Strachan*, 29th July 1760, No. 35, p. 8087; *Ersk. B. 2 T. 9, § 23*; *Lesser Institute*.

The Lords found, "That the payments made to Lady Dumfries are to be imputed in extinction of the original debt due to her, and that she is not bound to repeat any part thereof."

MERCHANTS' INSURANCE COMPANY OF PROVIDENCE v. ABBOTT AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1881.

[131 *Massachusetts Reports*, 397.]

GRAY, C. J. These actions are in the nature of assumpsit for money had and received, with special counts alleging that the plaintiffs were induced to pay the money by fraud and mistake. The five cases were tried together, but are not exactly alike.

In the first action, which is brought by the Merchants' Insurance Company of Providence, R. I., against Charles W. Abbott and the members of the firm of Denny, Rice & Co., the material facts are shown by the report of the presiding justice and the special findings of the jury to be as follows:—

On March 17, 1876, a woollen mill was destroyed by fire, upon the contents of which Abbott held a policy of insurance from the plaintiffs in the sum of \$2,500, payable in sixty days after satisfactory proofs and adjustment of loss, and providing that any fraud or false swearing in the proofs of loss should avoid the policy. Soon after the fire, Abbott made and delivered to the plaintiffs proofs of loss, and they, after a reasonable investigation, which disclosed no grounds for a refusal to pay, and in ignorance of any fraud on Abbott's part, adjusted the amount of the loss in accordance with such proofs.

Denny, Rice & Co. offered evidence of the following facts: At the time of the fire Abbott was indebted to them in the sum of about \$4,000. In the latter part of April, 1876, Abbott paid them about \$1,500 in cash, and, as security for the payment of the rest of his debt, executed an instrument in writing under seal, by which, after reciting the issuing of the policy, and that a claim for loss had arisen under it, he assigned to them all his "claims upon said insurance company for loss under said policy," and authorized them to demand and sue for the same in his name, if necessary, and the proceeds to enjoy to their own use, and generally to do all and every act in and about

the premises which he might do if this assignment had not been made.

In June, 1876, at the expiration of the sixty days allowed by the terms of the policy, the plaintiffs, in good faith, and not knowing of any fraud on Abbott's part, paid to Denny, Rice & Co. the amount of the loss as adjusted, and took a receipt signed by them in this form: "Boston, May 25, 1876. Received of the Merchants' Insurance Company of Providence \$2,478.80 in full satisfaction and discharge of all claim for loss and damage under this policy by fire March 17, 1876, and this policy is hereby cancelled and surrendered." The sum so paid exactly extinguished the debt of Abbott to Denny, Rice & Co., and they never paid any part of it to him.

The mill and its contents, as the jury found, were burned with the knowledge and at the instigation of Abbott, and his proofs of loss were false and fraudulent. The plaintiffs did not learn that they had been defrauded until May, 1877, and then at once placed the case in the hands of legal counsel for investigation, and for prosecution, if investigation should warrant it; and on January 16, 1878, brought this action. The other defendants had no knowledge of any fraud, nor was any demand for the money made upon them before this action was commenced.

On June 5, 1877, Abbott filed a petition in bankruptcy, and on October 3, 1877, obtained a certificate of discharge, and no dividend was paid out of his estate.

The justice presiding at the trial ruled that Abbott's certificate of discharge was no bar to this action; and, holding that the facts offered to be proved by the other defendants constituted no defence, directed a general verdict for the plaintiffs, and reported the case for such disposition and judgment as the full court should determine.

There can be no doubt of the liability of Abbott in this action. If the money had been paid by the plaintiffs to him, it could be recovered back as money paid under the influence of a mistake between them and him as to the existence of a state of facts that would entitle him to the money.¹ *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477; *Pearson v. Lord*, 6 Mass. 81; *Stuart v. Sears*, 119 Mass. 143; *Welch v. Goodwin*, 123 Mass. 71; 2 Phil. Ins. §§ 1816, 1817. Although Abbott has not in fact received the money, the payment of the money by the plaintiffs at his request in discharge of his debt to the other defendants is equivalent to the receipt by Abbott of so much money, and is sufficient to enable the plaintiffs to maintain the action against him upon the special count, if not upon the general

¹Accordingly, in two other actions, brought by the Manufacturers' Fire and Marine Insurance Co. and the American Insurance Co., respectively, against Abbott only, to recover back money paid to him by the plaintiffs under the same circumstances as between them, which were tried, argued and determined with the cases in the text.

The plaintiffs had judgment.

count for money had and received. *Emerson v. Baylies*, 19 Pick. 55; *Perry v. Swasey*, 12 Cush. 36. This liability of Abbott to the plaintiffs, being a debt created by his own fraud, is not barred by his certificate of discharge in bankruptcy. U. S. Rev. Sts. § 5117; *Turner v. Atwood*, 124 Mass. 411; *Mudge v. Wilmot*, 124 Mass. 493, and 103 U. S. 217.

As to the other defendants a different question is presented. If, before receiving the money from the plaintiffs, they had known the true state of facts, and had participated in Abbott's fraud, they would have been liable to refund the money. *Martin v. Morgan*, 3 Moore, 635; S. C. 1 Brod. & B. 289; *Gow*, 123; *Mason v. Waite*, 17 Mass. 560. But the report states that there was no evidence offered, nor was it contended at the trial, that they had any knowledge of the fraudulent conduct of Abbott, but it was conceded that they were wholly innocent parties.

As to them, therefore, assuming the truth of the facts which they offered to prove, the case stands thus: They held a valid debt against Abbott. The assignment by Abbott to them was made in consideration of that debt, and to secure the payment thereof. The previous existence of the debt does not make the assignment the less a conveyance for value. *Blanchard v. Stevens*, 3 Cush. 162; *Culver v. Benedict*, 13 Gray. 7; *Ives v. Farmers' Bank*, 2 Allen, 236; *Railroad Co. v. National Bank*, 102 U. S. 14, 58, 59. There is no question of the validity or of the genuineness of the assignment. Having been made after the fire, and after the amount of the loss had been adjusted between the plaintiffs and Abbott, it was in legal effect an assignment of a claim of Abbott upon the plaintiffs for a certain sum of money. That claim, not being negotiable in form, could not have been sued by these defendants except in Abbott's name, and subject to any defences which these plaintiffs had against him. But the plaintiffs, at Abbott's request, and without any suit, paid the amount of the loss, as adjusted between themselves and Abbott, directly to these defendants, who were wholly ignorant and innocent of the fraud of Abbott.

The plaintiffs do not stand in the position of resisting a claim of Denny, Rice & Co. on an alleged promise of the plaintiffs, in which case Denny, Rice & Co. would have to prove a valid contract of the plaintiffs to pay to them or to Abbott, their assignor. But the plaintiffs are seeking to recover back from Denny, Rice & Co. a sum of money which the plaintiffs have voluntarily paid to them, and which the plaintiffs assert to be wrongfully withheld from them by these defendants, and which they are therefore bound to prove that, as between these parties, the plaintiffs have the better right to, and it is inequitable and unjust that these defendants should retain.

The only contract of the plaintiffs was with Abbott, and the only mistake was as between them and him. The money was voluntarily

paid by the plaintiffs in discharge of Abbott's supposed claim upon them under their policy, and to these defendants as the persons designated by Abbott to receive it, and was in legal effect a payment by the plaintiffs to Abbott. These defendants received the money, not in satisfaction of any promise which the plaintiffs had made to them (for the plaintiffs had made no such promise), but under the agreement of Abbott with these defendants that they might receive it from the plaintiffs and apply it to the satisfaction of Abbott's debt to themselves. In other words, the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to recover from the plaintiffs, but as a sum which the plaintiffs admitted to be due to Abbott, under their own contract with him, and which at his request and in his behalf they paid to these defendants, who at the time of receiving it knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. This payment by the plaintiffs to these defendants at Abbott's request was a satisfaction of Abbott's debt to these defendants, and might have been so pleaded by him if sued by them upon that debt. *Tuckerman v. Sleeper*, 9 Cush. 177. As between the plaintiffs and these defendants, there was no fraud, concealment, or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold the money honestly, for value, with the right to retain it as their own, under a title derived from Abbott, and independent of the fraud practised by him upon the plaintiffs.

The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which *ex æquo et bono* they are bound to return either to Abbott or to the plaintiffs.

The case does not differ in principle from one in which B., having made a contract for the sale of goods in his possession to A., afterwards, by A.'s direction, actually delivers them to C., who has purchased them from A. in good faith for a valuable consideration as between A. and C., the nature of which is known to B., and B., upon subsequently discovering that the sale from himself to A. was procured by A.'s fraud, undertakes to recover the goods or their value from C.; or from a case in which a bank, having at the request of a debtor paid money to his creditor upon a bond or a check, under the mistaken

supposition that the bond is secured by mortgage of property of the bank, or that the bank has funds of the debtor sufficient to meet the check, seeks to recover back the money so paid.

In *Aiken v. Short*, 1 H. & N. 210; S. C. 25 L. J. (N. S.) Ex. 321, the action was brought by the public officer of a bank against an executrix to recover back money paid to her under the following circumstances: George Carter had made to the defendant's testator a bond secured by equitable mortgage on property devised to him by Edwin Carter; and had afterwards conveyed the same property to the bank, the latter agreeing to pay the bond. The defendant applied to George Carter to pay the bond, and was referred by him to the bank, which, conceiving that the defendant had a good equitable charge, paid the debt to get rid of the charge affecting its own interest. By the discovery of a later will of Edwin Carter, it turned out that George Carter had no title to the property, and consequently that the defendant had no title, and the bank had none. It was held that the bank could not recover back the money which it had paid to the defendant.

Chief Baron POLLOCK, according to Hurlstone and Norman's report, after stating the facts of the case, said: "The bank had paid the money, in one sense, without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was in fact paid by the bank as the agents of Carter." 1 H. & N. 214. By the similar but fuller report in the Law Journal, it appears that the CHIEF BARON, after observing that the bankers "had paid the money, no doubt, in one sense, without any consideration," added, "What is that to the defendant, who received it, having a perfect right to receive his [her] money from somebody, that is, from George Carter? And I think the bankers must be considered rather as paying it for George Carter, and they ought to have taken care that they did not pay in their own wrong when they paid it. It appears to me that this does not at all fall within any case whatever deciding that money may be recovered back because it has been paid under a mistake." 25 L. J. (N. S.) Ex. 323.

Barons PLATT, MARTIN and BRAMWELL were of the same opinion. Baron PLATT said, "The action for money had and received lies only for money which the defendant ought to refund *ex æquo et bono*;" and, after stating the other facts, said, "Carter referred her to the bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there

can be no obligation to refund it (1 H. & N. 214, 215) ; or, according to the fuller report, "He refers her to the bank. They, acting as his agents, upon being referred to, pay his debt. How can that be properly recoverable? Surely the debt is satisfied. The debt was due. It is not as though there were no debt due, and there was a mistake of fact; but here the debt was actually due, and the money was paid to satisfy that debt. It appears to me clear, beyond all question, that this money cannot be recovered back." 25 L. J. (N. S.) Ex. 324. Baron MARTIN said, "The case comes to this: If I apply to a man for payment of a debt, and some third person pays me, can he recover back the money because he has paid it under some misapprehension?" 1 H. & N. 213, 214.

In *Chambers v. Miller*, 13 C. B. (N. S.) 125; 32 L. J. (N. S.) C. P. 30, the plaintiff presented at the defendants' bank a check drawn on them by a customer, and received the money; and after he had counted it over once, and while he was recounting it, the defendants, having meanwhile discovered that the customer's account was overdrawn, forcibly detained the plaintiff, compelled him to give up the money, and returned the check to him; and he brought an action against them for assault and battery. Chief Justice ERLE at the trial ruled that the property in the money had passed to the plaintiff, and consequently that the defendants' justification failed; and his ruling was confirmed by the court in banc. The question whether the defendants had a right to take back the money by force, though mentioned by some of the judges, was not reserved or decided. See especially 32 L. J. (N. S.) C. P. 31, note.

The ground assigned for the decision by Chief Justice ERLE and Mr. Justice WILLIAMS was, that the money, having been once paid by the bankers to the payee of the check, became irrevocably his, and they could not have recovered it back from him in an action for money had and received, because as between them and him there was no manner of mistake, for the check was genuine, and the money was due from the drawer to the payee, and the mistake as to the amount of the drawer's funds in the hands of the bankers was a mistake between him and them only, with which the payee had nothing to do. The CHIEF JUSTICE distinguished the case from that of *Kelly v. Solari*, above cited, in that "there the money was paid to a party who had no right to it whatever, and the mistake was between the parties themselves as to the money being due." 32 L. J. (N. S.) C. P. 33. The like distinction was taken in *Hull v. South Carolina Bank*, Dudley, 259, 262, and in *Guild v. Baldrige*, 2 Swan, 295, 303.

So in *Pollard v. Bank of England*, L. R. 6 Q. B. 623. Lambton & Co., bankers, under the mistaken belief that they held funds of the acceptor of a bill of exchange, paid the amount of the bill to the Bank of England, which had discounted the bill for the drawer; and it was held, in a considered judgment delivered by Mr. Justice BLACKBURN,

in behalf of himself and Chief Justice COCKBURN and Justices MELLOR and LUSH, that Lambton & Co. could not recover back from the Bank of England the amount so paid, and that the Bank of England therefore held the amount on the drawer's account.

For these reasons, the court is of opinion that, assuming the truth of the facts of which evidence was introduced by the defendants, the plaintiffs may maintain the action against Abbott, and not against Denny, Rice & Co.

In any view of the case, Denny, Rice & Co. and Abbott cannot be jointly charged in this action. They have made no joint contract with the plaintiffs, nor have they jointly received money from the plaintiffs. The grounds of liability of the two are distinct. The liability of Abbott to the plaintiff rests upon the ground that, by reason of his fraud and their mistake, they have at his request paid money to the other defendants for his benefit; and it is independent of the question of the amount of his debt to the other defendants. The liability of Denny, Rice & Co., who were not parties to any fraud or mistake, can rest upon no other ground than their receipt and retention of money to which they have no right, and which, as between them and the plaintiffs, justly belongs to the latter; and this liability cannot exist unless the amount of the debt due from Abbott to them is less than the sum of money which they have received from the plaintiffs. The allegation in the amended declaration, that the money was paid by the plaintiffs for the joint use and benefit of both defendants, is therefore unsupported by the evidence, and the objection on the ground of this variance might be taken by the defendants at the trial. *Manahan v. Gibbons*, 19 Johns. 109.

The other four actions are brought against Abbott and the members of the firm of Browne, Steese & Clarke. The only particulars appearing by the report, in which these cases differ from the first, are that the evidence introduced by the other defendants tended to show that Abbott's debt to them was in part for money advanced by them to him after the fire; that each of the assignments executed by him to them was in form a simple assignment of all his "right, title, and interest in this policy, and all benefit and advantage to be derived therefrom;" and that in the fifth case Abbott signed a separate receipt similar to that signed by them, and the check given by the plaintiffs was payable to the order of Abbott and the other defendants.

But as the evidence introduced, as stated in the report, showed that in all these four cases "the amounts due on the policies as adjusted, assigned to them as aforesaid, were paid to Browne, Steese & Clarke by the insurance companies at the expiration of the sixty days allowed by the terms of the policies, and the money kept by them, and no part of it paid to Abbott," a majority of the court is of opinion that neither the difference in the form of the assignments in the four cases, nor that in the form of the receipts and of the check in one of them, can

affect the result; but that the assignment in each case, having been made after the fire, and after the adjustment of the loss as between the company and Abbott, was in legal effect not an assignment of the policy as an existing contract of indemnity against future contingencies, but only an assignment of a claim upon the company for an ascertained sum of money; and that assuming the truth of the facts offered to be proved by the defendants, this sum, having been paid by the company to Browne, Steese & Clarke, without any fraud or mistake as between them, and not exceeding the amount of the demands of Browne, Steese & Clarke against Abbott, cannot be recovered back from them, but from him only.

The report provides that, if the court should be of opinion that the plaintiffs have no joint cause of action against the defendants, they may elect which of the defendants they will discontinue against, and such further proceedings shall thereupon be had as law and justice may require. The other defendants, in each case, contend that, as Abbott is the only party whose residence or place of business is in the county of Middlesex, the other defendants residing and doing business in Suffolk and the plaintiffs being a foreign corporation, therefore, if the plaintiffs elect to discontinue against Abbott, the defendants should be entitled to the same right to move to dismiss, or plead in abatement, that they would have had if the action had originally been brought against them alone, and they propose to plead in abatement that, as between them and the plaintiffs, the action is brought in the wrong county. Gen. Sts. c. 123, § 1. But the action was rightly brought in the county in which one of the defendants resided, and the case has been fully tried on the merits, without objection being taken to the venue by motion to dismiss or answer in abatement. The statutes provide that amendments discontinuing as to any joint plaintiff or defendant may be allowed at any time before final judgment, that judgment shall not be arrested in any civil action by reason of a mistake of venue; and that judgment may be entered against such defendants as are found on the trial to be liable on the contract declared on, notwithstanding it is found that all the defendants are not jointly liable thereon. Gen. Sts. c. 129, §§ 41, 79; c. 146, § 4; c. 133, §§ 5, 6. And the court is not ousted of its jurisdiction of a transitory action, once acquired by service upon a defendant residing in the county, by a failure to recover against him at the trial. *Lucas v. Nichols*, 5 Gray, 309. The plaintiffs are therefore entitled, pursuant to the leave reserved in the report, to elect to prosecute their action against either defendant.

Under the rulings at the trial, the facts which the evidence introduced by the other defendants tended to show, as to the validity and amount of Abbott's debts to them, became immaterial, and were not passed upon by the jury, and the plaintiffs are entitled, if they so elect, to a new trial for the purpose of determining these facts. If,

for this purpose, they elect further to prosecute either action against the other defendants, they must discontinue against Abbott; and neither the question of Abbott's fraud, which has been fully tried and settled by the verdict, nor the question of the other defendants' innocence of that fraud, which was conceded at the former trial, is to be open upon the new trial. *Winn v. Columbian Ins. Co.*, 12 Pick. 345; *Robbins v. Townsend*, 29 Pick. 345; *Bardwell v. Conway Ins. Co.*, 118 Mass. 466. If, on the other hand, the plaintiffs elect to discontinue against the other defendants, judgment must be entered for the latter, and

*Judgment for the plaintiffs against Abbott alone.*¹

¹In *Walker v. Conant* (1888) 69 Mich. 321, the facts and holding of the court were as follows: "Stripped of all sophistry, the naked case is this: Van Riper obtains \$3,000 of the plaintiff upon a forged mortgage, and, out of the money so obtained, pays Mrs. Conant the debt he owes her, which is evidenced by a forged note, and secured by a forged mortgage upon the same premises described in the mortgage to plaintiff. The money is honestly her due, and she has an equitable right to demand and receive it of Edgar [Van Riper]; and, believing her securities to be genuine and valid, she takes the money, and surrenders them up to him to be canceled and destroyed, and in utter ignorance of the fraud perpetrated by Van Riper. . . .

"And the authorities are uniform that where the money is received in good faith, and in the ordinary course of business, and for a valuable consideration, it cannot be recovered back because the money was fraudulently obtained of some other person by the payor.

"To hold otherwise would be to put every man who receives money in the due course of his business upon inquiry, at his peril, as to the manner in which such money was procured by the payor. *Justh v. Bank*, 56 N. Y. 484; *Mason v. Waite*, 17 Mass. 563; *Warren v. Haight*, 65 N. Y. 171, 178; *Reed v. Bank*, 6 Paige, 337; *Currie v. Misa*, 12 Moak, Eng. R. 592, 605; *Watson v. Russell*, 31 L. J. Q. B. 304; *Rapalje v. Emory*, 2 Dall. 51, 54; *Stevens v. Board*, etc., 79 N. Y. 183."

And in *Spaulding v. Kendrick* (1898) 172 Mass. 71, 72, KNOWLTON, J. (since C. J.), said: "The law of the case is settled by numerous decisions. If a thief gives stolen money, or negotiable securities before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or securities as belonging to him, the creditor can hold the property as against the true owner. As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, should carry on its face its own credentials. *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Lime Rock Bank v. Plimpton*, 17 Pick. 159; *Greenfield School District v. First National Bank*, 102 Mass. 174; *Thatcher v. Pray*, 113 Mass. 291; *Ex parte Apsey*, 3 Bro. C. C. 265; *Jacques v. Marquand*, 6 Cowen, 497; *Dunlap v. Lima*, 49 Iowa, 177. See also *Mason v. Waite*, 17 Mass. 560, 563; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488. It has often been decided in this Com-

SECTION II.

THE FAILURE IS DUE TO NON-PERFORMANCE OF THE CONTRACT OR OF A CONDITION BY ONE PARTY.

1. THE DEFAULT IS DEFENDED ON THE GROUND THAT,—

(a) *Performance is Impossible.*

(1) *The Defendant pleads Impossibility.*

WATSON v. DUYKINCK.

SUPREME COURT OF NEW YORK, 1808.

[3 *Johnson*, 335.]

THIS cause came before the court, on a writ of error, from the Court of Common Pleas of the city and county of *New-York*. The suit below was an action of *assumpsit* for money had and received to the use of the plaintiff, and a special verdict was found, upon which the court gave judgment in favor of the plaintiff for 60 dollars, on which the defendant below brought a writ of error to this court. The substance of the special verdict was as follows: The defendant below,

monwealth that a pre-existing debt is valuable consideration for a payment made or a security given on account of it. *Blanchard v. Stevens*, 3 Cush. 162; *Fisher v. Fisher*, 98 Mass. 303; *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, 199: *Merehants' National Bank v. Haverhill Iron Works*, 159 Mass. 158; *National Revere Bank v. Morse*, 163 Mass. 383."

In *Youmans v. Edgerton* (1878) 16 Hun. 28 (affirmed in 91 N. Y. 403) the same principle was applied. It appeared that one A. contracted with B. to convey the latter a tract of land upon payment of the full purchase price. A. assigned his contract with B. to X., and B. assigned his interest in the contract for conveyance to Y., who paid the balance of the purchase price to X., A.'s assignee, and called for a conveyance. It appeared that A. did not have title to the land in question, but this fact was unknown to the various parties other than A. The conveyance not being forthcoming, Y. sues X. in *assumpsit* as for a failure of consideration, but the court held, and rightly, it would seem, that Y.'s claim against A., not X., who was a purchaser for value from A.

To quote from the Court: "Upon the facts found by the referee, the plaintiff might have an action against Shorer [A.] for breach of contract, or by suit for specific performance, but none against Edgerton [X.], either upon legal or equitable grounds; the money which he got was actually due to him, and there can be no obligation to refund it." 91 N. Y. 403, 411.—See also *Newhall v. Wyatt* (1893) 139 N. Y. 452.

The doctrine of purchaser for value, upon which the right of retention in

(*Watson*) on the 17th December, 1805, was master of the sloop *Harriot*, bound on a voyage from *New-York* to the island of *St. Thomas*. *Watson* agreed with the plaintiff below (*Duykinck*) that, in consideration of 100 dollars to be paid immediately, he would suffer the plaintiff to proceed in the sloop, as a passenger, on the voyage, and to load on board, for transportation, merchandise to the value of 600 dollars, and that the defendant would provide meat, drink, &c. for the plaintiff, during the voyage." The plaintiff agreed to pay that sum, and accordingly paid it on the same day to the defendant. On the 23d December, 1805, the plaintiff embarked, as a passenger, and defendant procured sufficient necessaries, &c., and the plaintiff put goods on board, to the value of 600 dollars. The sloop sailed on the same day, on the voyage, and was seaworthy. She sprung a leak, two days after leaving the port of *New-York*, and was obliged to bear away for *New-London*. On her way there, she was unavoidably wrecked on *Norwalk Island*, and lost; the master and crew returned, in 10 days thereafter, to *New-York*. The chief part of the cargo was saved and brought to *New-York*, and the goods of the plaintiff were delivered to him. The plaintiff assisted equally with the crew in endeavoring to save the vessel and cargo. The expense of saving the cargo, and bringing it to *New-York*, was paid by the defendant. The average charge on the plaintiff's goods, towards the expenses of salvage, was 20 dollars. The defendant provided no other vessel, but the plaintiff went to *St. Thomas* in another vessel. The usual price

these cases depends, is admirably stated in the following passage from Lord BOWEN's opinion in *Taylor v. Blakelock* (1886) L. R. 32 Ch. D. 560, 569-70: "Blakelock has got a legal right to this property, and why on earth is it to be taken away from him? It can only be taken away from him on the ground of some breach of trust which affects it. No doubt, if he had notice, then his legal title would disappear, would be invalidated. If he was a volunteer he could not stand in a better position than the person who conveyed to him; but if he is not a volunteer, upon what principle can you take away his property?"

"That really reduces it to the simple question of what is the meaning of the term 'a purchaser for value' in such cases? 'A purchaser for value' is a well-known expression to the law. By the common law of this country the payment of an existing debt is a payment for valuable consideration. That was always the law before the reign of Queen Elizabeth, as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country; and many of the commercial instruments which the law recognizes have no other consideration whatever than a pre-existing debt.

"The man who has a debt due to him, when he is paid the debt, has converted the right to be paid, into actual possession of the money; he cannot have both the right to be paid and the possession of the money. In taking payment he relinquishes the right for the fruition of the right. In such a case the transaction is completed; and to invalidate that transaction would be to lull creditors into a false security, and to unsettle business."—Ed.

for a passage to *St. Thomas*, for a passenger, is 80 dollars, and 50 dollars, if he finds himself. By the usage and custom of *New-York*, passage money is paid, at the time the passage is taken, and is never refunded if the voyage has begun, though a subsequent accident should prevent its completion. But whether the plaintiff is entitled to recover back the 100 dollars paid by him, or the same after deducting the salvage aforesaid, or whether the defendant is entitled to have the 20 dollars certified in his favor, the jurors are ignorant, &c.

The following points were made and insisted on by the counsel for the plaintiff in error:

1. That the passage money cannot by law be recovered back, under the circumstances of the case.

2. That the custom found by the jury is conclusive against such recovery.

3. That, even if the plaintiff was entitled to recover back his passage money, it could not be in this form of action.

KENT, Ch. J., delivered the opinion of the court. The record in this case presents a question of some nicety and difficulty, arising under the marine law. The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master, in case of shipwreck, to restore to the shipper the freight previously advanced. The *English* books are almost silent on the subject, and afford little or no information; but if we resort in this, as we are obliged to do in many other instances, for light and information, to foreign compilations, and distinguished writers on maritime jurisprudence, we shall find the point before us to have been considered and decided.

Cleirac, in his commentary on the judgments of *Oleron*, art. 9. no. 9 (*les Us. et Coutumes de la Mer*, p. 42.) declares, that in cases of shipwreck, the master is bound to render to the merchants, the advances which they may have made upon the freight, and he cites a decision of one of the early jurists, in confirmation of his doctrine: *Naufragio facto exercitor naula restituit quæ ad manum perceperat, ut qui non trajecerit*. The ordinance of the marine (tit. *du Fret*, art. 18.) recognizes this ancient rule, and ordains, that if goods be lost by the perils of the sea, the master shall be holden to refund the freight which had been previously advanced to him, unless there be a special agreement to the contrary. This agreement, according to *Valin*, (*Comm. sur l' Ord. tom. 1. p. 661.*) always contains an express stipulation, that the money advanced shall be retained in any event which may happen in the course of the voyage. The policy of the general rule on this subject, was to take away the temptations to negligence or misconduct, which the certainty of freight was calculated to produce in the master. I ought, perhaps, to observe, that there is a *dictum* of Mr. Chief Justice SAUNDERS, stated in an anonymous case, in 2 Show. 283, which would seem to imply, that advance money for

freight was, in no event, to be refunded; but I do not place reliance upon that very imperfect report, in opposition to the explicit opinions of the writers which have been mentioned.

The general principle undoubtedly is, that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried, by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail.

The general rule being then well established, the present case turns upon this point, whether the agreement stated in the special verdict, be such as to take the case out of the operation of the rule. The parties agreed, that in consideration of 100 dollars, to be paid immediately, the one would suffer the other to proceed and go in the sloop, as a passenger, on the voyage, and to load on board, for transportation, merchandise to the value of 600 dollars, and that he would also maintain him as a passenger, during the voyage. The other party assented and paid the money, and put the goods on board, and proceeded with them as a passenger, until the disaster took place. This agreement did not go the length required by the *French* law of stipulating that the money should at all events be retained, but it was still particularly confined to the permission to be received on board, as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and *deliver* at the place of destination. In the one case, the master places his compensation upon the actual carriage and delivery of the goods. The safe arrival of the subject is a condition precedent to the payment. In the other case, the consideration is rendered by receiving the goods on board, and making all due and *bona fide* efforts to carry and deliver them. I think this latter is, upon the whole, the better construction of the agreement before us, especially as the practice of retaining the advance freight, in all such cases, must have been known to the parties, from the usage which has been found by the jury, and as the distinction between an agreement to receive on board, and an agreement to transport and deliver, is not a new refinement, but can be traced back to the text of the civil law. The doctrine is recognized and adopted by various authors, that if the agreement be to pay freight for the *loading of the article on board*, the freight is due, though the article perish in the course of the voyage. This is the language of the civil law.

Gothofredus, in his notes on the *Digest* (14. 2. 10.) states the distinction in more clear and explicit terms: *Conduxisti vehenda mancipia: mancipium unum in navi mortuum est; quæritur, num vectura debeat? Si de mancipiis vehendis inita conventio est, non debetur: si de mancipiis tantum navi imponendis debetur.*

Molloy (b. 2. c. 4. § 8.) and *Abbott* (p. 225.) seem to have followed the same authorities, but without making any discrim-

ination between the cases where the money was, and where it was not actually advanced beforehand. Perhaps, no such discrimination is to be made, though I think the case of the money actually advanced is the stronger case, as forming superior evidence of the intention of the parties that the freight received should, in every event, belong to the master.

We conclude, upon the whole view of this case, that *Watson*, the plaintiff in error, was entitled to retain the freight money, and, consequently, that the judgment below ought to be reversed.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment reversed.

REINA v. CROSS.

SUPREME COURT OF CALIFORNIA, 1856.

[6 *California*, 29.]

APPEAL from the District Court of the Twelfth Judicial District.

The record discloses that on the 13th of March, 1855, the plaintiff, and David Mitchell, as master, entered into a charter party, by which Mitchell chartered to the plaintiff the ship *Don Juan*, for a voyage from "San Francisco to Acapulco, there to load such pearl shell and Brazil wood as the charterer may have ready; thence to proceed to Salado, there to complete a full cargo of Brazil wood, and proceed therewith to Valparaiso." Among other things, it was stipulated that the charterer "advance on (said) freight \$500, payable at San Francisco, on signing the charter party, and \$1,000 on arrival at Acapulco, free of interest and commission." The balance of the freight was to be paid upon delivery of the cargo at Valparaiso. The respective sums of \$500 and \$1,000 were paid at the time and places designated. The first payment was made directly to Cross the defendant, and the second by draft on San Francisco. The ship was laden in accordance with the articles of agreement, and on her voyage to Acapulco was wrecked, and vessel and cargo totally lost. This action was instituted to recover back the sum of \$1,500 freight paid in advance.

The complaint contained two counts. The first setting forth the charter party and assigning the breach thereof, without alleging that it was caused by the fault or negligence of the defendant. The second was for money had and received by the defendant for the use of the plaintiff. The latter count contained no allegation that demand had ever been made upon the defendant for the money. The defendant filed a general demurrer which the Court sustained, with leave to the plaintiff to amend his complaint upon payment of costs. The plain-

tiff waived his right to amend. and agreed that judgment might be entered against him upon demurrer, and from the rendition of such final judgment, plaintiff appealed to this Court.

Robert C. and Daniel Rogers, for Appellant.

Where freight is paid in advance on a contract for the transportation of goods, and the vessel is shipwrecked, so that the voyage is broken up, the master or owner is bound to refund the freight so paid, where there is no special agreement to the contrary. *Watson v. Dwykinck*, 3 Johns. 335; *Pitman v. Hooper*, 3 Sumner, 50; *Griggs v. Austin*, 3 Pick. 20; *Mashiter v. Bueler*, 1 Campb. 84.

The opinion of the Court was delivered by Mr. Justice TERRY. Mr. Justice HEYDENFELDT concurred.

This action was brought by plaintiff to recover from defendant certain money advanced on a contract of affreightment.

The complaint alleges that defendant contracted to carry certain freight from the port of Acapulco to Valparaiso, in consideration of a certain sum of money, a portion of which was paid by plaintiff in advance. That defendant received said freight on board his vessel and departed on the voyage, but did not perform his contract, because of the loss of said vessel at sea.

The complaint also contains a second count for money received to the use of plaintiff. To this complaint defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The Court below sustained the demurrer, and judgment was rendered in favor of defendant. From this judgment plaintiff appealed.

The second count of the complaint is bad, because it is not alleged that demand had been made on defendant. A party receiving money to the use of another, is rightfully in possession until the same is demanded.

The only question involved in this case is, the right of plaintiff to recover advanced freight money upon the non-performance of the contract of affreightment.

The general rule of law is, that where money is paid by one person in consideration of an act to be done by another, and the act is not performed, the money so paid may be recovered back. Contracts for carrying freight form no exception to this rule, unless by express stipulation of the parties.

Chief Justice KENT, in *Watson v. Dwykinck*, says: "The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master, in case of shipwreck, to restore to the shipper the freight previously advanced." (See 3 John. 339, and cases there cited.) The general principle undoubtedly is, "that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then

forms the ordinary case of money paid upon a consideration which happens to fail." *Id.* p. 340.

Chief Justice PARKER, in *Griggs v. Austin*, 3 Pick. 23, says: "It would be an affectation of learning to go over the ground so ably pre-occupied in the opinion given in that case (*Watson v. Duykinck*), especially as the same ground has been traversed by Mr. Justice STORY in a note to his edition of *Abbot on Merchant Ships*. It is sufficient then to say, that by reference to the above cited opinion, and the note of Mr. Justice STORY, it will be found to be the established law of the maritime countries on the continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be re-paid, unless there be a special agreement to the contrary." See also *Samson v. Ball*, 4 Dallas, 459; *Giles v. Brig Cynthia*, 1 Pet. Admr. 203; *Cheriot v. Barker*, 2 John. 346; *Gillan v. Simpkin*, 4 Camp. 241; *Harris v. Rand*, 4 N. H. 259, 555; 3 Kent's Com. 226, 227.

I am aware that there are decisions of the English Admiralty Courts, which seem to be in conflict with the cases cited; but the weight of authority, and the uniform ruling of the American Courts, are conclusive as to the right of the shipper to recover.

The final judgment of the Court below, as well as the judgment sustaining the demurrer, is reversed with costs, and the cause remanded.¹

WRIGHT v. NEWTON.

EXCHEQUER, 1835.

[2 *Crompton, Meeson, and Roscoe*, 124.]

ASSUMPSIT for money had and received. Plea. *non assumpsit*.

At the trial before ALDERSON, B., at the last Lancaster assizes, it appeared that the defendant, being in the occupation of a public-house, and being desirous of leaving it, entered into a verbal agreement with the plaintiff for the sale to him, on behalf of a Mrs. Williams, of the good-will and fixtures of the house, at the sum of £120, £50 of which was to be paid on the Monday after, if the landlord consented to the change of tenancy, and on payment of the remainder of the money

¹As stated in the text of the principal cases, the English law is contra. See *De Silvale v. Kendall* (1815) 4 M. & S. 37; *Allison v. Bristol Marine Ins. Co.* (1876) L. R. 1 App. Cas. 209, 225; *Byrne v. Schiller* (1880) L. R. 5 Ex. 319. In this latter case COCKBURN, C. J., said:

"It is settled by the authorities referred to in the course of the argument that by the law of England a payment made in advance on account of freight

the defendant was to give up possession. The £50 was paid to the defendant on the 19th of May, and on the 20th, on application being made to the landlord, he verbally agreed to accept Mrs. Williams as tenant. In consequence of this, Mrs. Williams, for whom the house had been taken by the plaintiff, removed, and took her furniture to the defendant's house, and went to reside there, and continued there for five or six weeks, and carried on the business, but the defendant and his wife also continued to reside there. It appeared, that, on the 2d of June, the landlord withdrew his consent to accept Mrs. Williams as tenant. The defendant on being informed of this, said that Mrs. Williams might keep his, the defendant's, name up, and he would give possession in spite of the landlord. Mrs. Williams subsequently, by the defendant's consent, took away her furniture, but the defendant refused to return the £50. The defendant afterwards sold the good-will and fixtures to another person, who was accordingly let into possession. This action was brought to recover back the sum of £50, as money had and received for the use of the plaintiff. The learned BARON left it to the jury to say whether the parties had agreed to rescind the contract, and if they were of that opinion, he directed them to find a verdict for the plaintiff; which they accordingly did.

Cresswell now moved by leave of the learned BARON to enter a non-suit.

PARKE, B. It seems to me that this was a contract with a condition that the landlord's consent should be obtained; and the question is, has that condition been performed? There was a deposit of £50 made upon the landlord's agreeing to take Mrs. Williams as tenant, but the remainder of the money not having been paid, and Mrs. Williams not having entered into possession as tenant, the landlord subsequently withdrew his consent. I think it must be taken as if the landlord never has consented; and if so, the condition has not been performed. There would be nothing to bind the landlord unless there had been an actual transfer of the possession. The money was paid on a consideration which has failed, and therefore the plaintiff is entitled to recover it back, as money had and received to his use. The simple question is, whether the landlord's consent of the 19th of May was binding upon him? I think it was not, and therefore the condition was not performed. There must be no rule.

BOLLAND, B. The consent would have been sufficient if Mrs. Williams had acted upon it before it was withdrawn, by paying the remainder of the purchase-money, and getting into possession as tenant.

cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity to the American doctrine and contrary to ours."—ED.

As it was withdrawn before Mrs. Williams took possession as tenant, I think that the verdict was right.

ALDERSON, B. I think that the defendant never gave up possession to Mrs. Williams as tenant. He kept possession of the house for a very good reason; because the remainder of the purchase-money was not paid.

Rule refused.

FERNS v. CARR.

CHANCERY DIVISION, 1885.

[*Law Reports*, 28 *Chancery Division*, 409.]

ARTICLES of agreement, dated the 16th of November, 1880, were entered into between *Henry Joseph Carr*, a solicitor, of the one part, and *Francis Ferns*, the Plaintiff, and his son, *Harry Clifford Ferns*, of the other part, by which *Harry Clifford Ferns* was bound as an articled clerk for the term of five years to *Henry Joseph Carr*, who, in consideration thereof, and of £150 paid him by the Plaintiff, covenanted to receive *H. C. Ferns* as his clerk, and "that the said *H. J. Carr* will, by the best ways and means he may or can, and to the utmost of his skill and knowledge teach and instruct, or cause to be taught or instructed, the said *H. C. Ferns* in the said practice or profession of a solicitor which the said *H. C. Carr* now doth or shall at any time hereafter during the said term use or practise," and at the end of the term to use his best means and endeavors to procure *H. C. Ferns* to be admitted a solicitor.

Mr. *H. J. Carr* died in December, 1883. He had no partner, and no arrangements were made that Mr. *H. C. Ferns* should complete his articles with another solicitor. This action was brought by Mr. *Francis Ferns* against the executors of Mr. *H. J. Carr*. The Plaintiff claimed the return of a proportionate part of the premium of £150 and in the alternative damages for the non-performance of the agreement so far as it remained unperformed. The action was heard on summons for judgment on admissions.

Decimus Sturges, for the Plaintiff:—

This case is exactly the same as *Hirst v. Tolson*, 2 Mac. & G. 134, which has been recognised in *Atwood v. Maude*, Law Rep. 3 Ch. 369, 375. It is true that in *Whincup v. Hughes*, *ibid.* 6 C. P. 78, it was held that no part of an apprenticeship premium was returnable, but in that case the master was not a solicitor, and I submit that the reason given in the older cases—*Ex parte Prankerd*, 3 B. & A. 257; *ex parte Bayley*, 9 B. & C. 691—for exercising the jurisdiction in the case of articled clerks, that the Court has a peculiar jurisdiction over

its own officers, sometimes styled a paternal and masterful jurisdiction, is sufficient to uphold *Hirst v. Tolson*, 2 Mac. & G. 134. Other old authorities are *Newton v. Rowse*, 1 Vern. 460, and *Unwin v. Fawnt, Finch*, 144. The contract by the deceased in this case was binding on the executors to cause the clerk to be instructed during so much of the term as was unexpired at the death of Mr. Carr.

Ingle Joyce, for the Defendants:—

Hirst v. Tolson was in effect overruled by *Whineup v. Hughes*. The Judges in the latter case were unanimous in thinking the opinion of Lord COTTENHAM in the former could not be supported. The ground of the decision was not that there was any difference between a solicitor and any other person, so far as his contract with an apprentice is concerned. On principle, the Court has no peculiar jurisdiction over a solicitor or a solicitor's representatives in respect of matters outside his duties as solicitor.

The articles contained nothing unusual, nor anything to impose an obligation to find a successor to Mr. Carr as master.

The clerk in this case has had the full benefit of the premium paid, having been instructed for three years; the time has arrived when the loss from the determination of the relationship is on the master's side.

Decimus Sturges, in reply.

PEARSON, J. There have been a good many cases in the books on matters of this kind. It would seem that in the older cases even the Courts of Law have interfered between solicitors and their clerks to determine whether any part of the premium ought to be returned. One of the earliest cases cited to me was that of *Ex parte Pranker*d, 3 B. & A. 257, 258. In that case an apprentice had run away from service, and the solicitor refused to take him back. Chief Justice ABBOTT said: "It is extremely convenient that, in cases like the present, the Court should exercise a summary jurisdiction for adjusting disputes between the officers of this Court and their clerks. It appears to have been exercised by us and by our predecessors; and I think we ought not to disturb so useful a practice. This is very different from the case cited from the Exchequer. Our jurisdiction here depends on the authority of the Court over its own officers." Now, in that case, the contract had not come to an end by the death of either party. The next case was the case of *Ex parte Bayley*, 9 B. & C. 691. There an attorney had died, and Lord TENTERDEN says: "I am of opinion that this case is not to be decided by any strict rule of law. The Court exercises a jurisdiction over attorneys, and that is to be exercised according to law and conscience, and not by any technical rules; and considering the circumstances of this case, and the effect of the Act of Parliament which prohibits attorneys from having more than a certain number of clerks, we think that the report should be confirmed. This clerk was bound to one only in name, but in reality and in conscience he was bound to two; he was to be instructed by the two

who were in partnership together; and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the Act of Parliament, and enable the partners to have that number of clerks which they could not otherwise have had if *Bayley* had been bound to the two instead of one of them. In conscience, it appears to me to be a binding to the two; the premium was paid to the two; and the one being dead, and the other having the full number of clerks which the law allows him, and not being able to retain this young man in his service, and instruct him and give him the benefit for which he paid the money, I think he who is the survivor is bound to refund whatever is to be refunded." Then he said the master had found a sum, and that ought to be paid. It is to be remarked on the judgment in that case that the opinion of the Court was that although the bond was to one partner only the clerk was bound to the firm and there was a person surviving and able to fulfil the contract with him, except so far as he had put it out of his power to take another clerk. I do not think that case governs the present, because in the present it is admitted that there is no person who can fulfil the contract.

I think I may pass over the other cases and come to the case of *Hirst v. Tolson*, 2 Mac. & G. 134, which is hardly, if at all, to be distinguished from the present case, and I suppose if it had not been commented upon in a later case cited to me it would have been my duty to follow it and decide that a portion of the premium was returnable. But when the case of *Hirst v. Tolson* was most carefully considered by the Judges in the Exchequer Chamber, in *Whincup v. Hughes*, Law Rep. 6 C. P. 78, they all dissented from it, considering, with all respect to Lord Chancellor COTTENHAM, that his judgment was wrong and saying there was no debt at law. Now if there is no debt at law, which I must take to be the fact on the authority of that case, it is exceedingly difficult to say there is any debt in equity, and if there is no debt in equity I am thrown back on that which is said to be the paternal and masterful jurisdiction over attorneys. I must say I do not understand what that is. I quite understand it put in another form, that every one who is a solicitor is an officer of the Court, and in respect of his conduct as such the Court has a summary jurisdiction which it exercises in a manner beneficial both to solicitors and others. But I cannot understand how there can be a paternal and masterful jurisdiction which can enable the Court to say that a contract between a solicitor and a third person is to be construed in another way than a like contract between other persons, and that notwithstanding the contract means one thing, the solicitor is to do another because the Court thinks it more honourable. I think if I were so to hold I should be assuming a jurisdiction to enforce a code of morals not written and not to be found definitely stated by any authority, and should be making the rule of the Court to vary, as

Lord [John] SELDEN (Selden, Table Talk, title Equity) once said it did vary, according to the length of the foot of each Lord Chancellor.

I will go a step further and say if I were wrong in the conclusion I have come to, if I were to disregard the strict meaning of the contract. I should have great difficulty in saying that anything ought to be returned in this case. At least I should come to the conclusion that it ought to be a very small sum. The premium was £150; during three years the articulated clerk has had the benefit of the solicitor's instruction, and, if he has benefited from it to the extent to which he ought, his services would be of considerable value to the solicitor for the next two years. And I very much doubt whether, upon any consideration, anything would be returnable except a very small sum. Under all the circumstances, though not without some doubt, because of the authorities cited, I think I must come to the conclusion that there is no power in the Court on a contract of this kind to say that any part of the premium ought to be returned.¹

¹In the leading case of *Whineup v. Hughes* (1871) L. R. 6 C. P. 78, it appeared that the plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying a premium of £25. The master duly instructed the apprentice for one year, and then died. The plaintiff brought an action for money had and received against the master's executrix to recover the whole or some part of the premium on the ground of failure of consideration. The court, however, refused recovery on the ground that there was only partial not a total failure of consideration.

The following two cases concerning the rights and status of members of the legal profession, may be of interest. In *Coe v. Smith* (1853) 4 Ind. 79, an attorney engaged to defend a cause for \$500, but died before the suit was determined. His administrator was allowed on a *quantum meruit*, the amount —\$175—which the intestate's services were really worth to the client.

In *McCammon v. Peck* (1895) 9 Oh. Ct. Ct. 589, the sum of \$1500 was paid in advance to J. M. Jordan, a distinguished attorney of Cincinnati, to carry a case to final determination. After performing services of the admitted value of \$250, Jordan died, and the client brought suit to recover the unearned portion of the fee. The Circuit Court permitted recovery, in what would seem to be an unanswerable opinion; but on appeal, the judgment was reversed, without opinion by the Supreme Court, evidently acting on the advice of Lord MANSFIELD to "decide promptly, but never give any reasons for your decisions. Your decisions may be right but your reasons are sure to be wrong." The two cases are one in principle, and recovery should have been permitted in the latter as well as in the former. In both instances, however, the courts stood by the profession.—ED.

KNOWLES v. BOVILL AND ANOTHER.

EXCHEQUER, 1870.

[22 *Law Times Reports*, 70.]

The plaintiff was the holder of a license to use a certain patented invention from the patentee. The patentee intending to apply for a prolongation of this patent, and also for a patent for a new invention of a similar description, the plaintiff agreed to give him £150 for the free use forever of the former patent, as well as for the free use for three years of the new patent which the patentee was about to take out. The £150 was paid to the patentee, but he died almost immediately afterwards, and in consequence of his death no application was ever made for a renewal of the former patent, or the grant of one for the new invention. The plaintiff brought an action against the patentee's executors to recover back the £150, on the ground that the consideration of it had totally failed.¹

The question for the court was, whether the plaintiff was entitled to the return of the £150.

MARTIN, B. In my opinion the plaintiff is entitled to our judgment. The true test in this case is the question, What did he buy? In my opinion he bought an application for the grant of one patent and the prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he bought was an application. The result is that the consideration in this case wholly fails, because it is admitted such application never was and now never will be made. The law in some cases implies a contract when the parties have not expressly made one. In cases of the total failure of consideration for a simple contract, it implies a contract to repay the money which has been paid for the consideration that has so failed. If I thought Mr. *Garth's* contention were correct, and that plaintiff only bought the chance whether an application would be made and prove successful, the case might be different, but I do not think that is the true meaning of the contract.

BRAMWELL, B. I am of the same opinion. The plaintiff manifestly paid his money for the right to have an application made for the renewal of the one patent and the granting of the other. It cannot be doubted that if Mr. Bovill had lived and no application had been made, the plaintiff would have been entitled to recover his money. From this it is perfectly clear he bought the right to have such application made. In point of fact it was not made. Then why is his claim not well founded? Mr. *Garth* invokes a rule of law; he claims

¹The head-note is substituted for the elaborate statement of the report, and arguments of counsel are omitted.—ED.

to read such a contract with a qualification implied by law that Mr. Bovill is only bound to make such application if he lives; he is to be excused by death. Mr. *Quain* may fairly say then, "I am entitled to add a qualification to that qualification, viz., that if he dies the money shall be returned." I am strongly of opinion that the law ought never to imply terms in a contract unless the justice or necessity of the case obviously and imperatively demands it. But if a party contends that there is such a qualification when the engagement is of a personal character, how can he object to the qualification being qualified as I have pointed out? Can anything be more obviously just and reasonable? Why should the contractor's death be a benefit to his estate, and inflict a loss on the other party? In such a case the court only introduces a term which it is satisfied, not perhaps that the parties intended, but that they would have intended if they had contemplated the circumstances which have arisen.

PIGOTT, B. I am of the same opinion. It is quite clear that the intention of the parties was that there should be an application for these patents, and that such application formed the consideration for the payment of the money. There never was any such application, and consequently the consideration wholly failed.

CLEASBY, B. It is clear that what plaintiff bought was the chance of Mr. Bovill being successful in his application or not, not the chance of his making it or not; that would have left it in his option to make it or not, whereas it was admitted if he had lived and not made it the plaintiff would have recovered.¹

Judgment for plaintiff.

(2) *The Plaintiff Pleads Impossibility.*

LUKE *et al.* v. LYDE.

KING'S BENCH, 1759.

[2 *Burrow*, 882.]

A SPECIAL case from the last Devonshire assizes; reserved by Lord MANSFIELD, who went that circuit last summer.

The defendant Lyde shipped a cargo of 1501 quintals of fish, at the port of St. John in Newfoundland, on board the ship "Sarah," belonging to the plaintiffs, to be carried to Lisbon. The plaintiffs were to be paid freight, at the rate of two shillings per quintal. The original price of the said cargo was, at Newfoundland, ten shillings and sixpence sterling per quintal.

The plaintiffs had also on board the said "Sarah," a cargo of 945 quintals of fish, which was their own property.

¹Compare *Taylor v. Hare* (1805) 1 B. & P. N. R. 260, *ante*, 428.—ED.

The ship sailed from the port of St. John on 27th November, 1756, and had proceeded seventeen days on her voyage, and was taken on the 14th of December following; within four days' sail of Lisbon, by a French ship. And the captain, the other officers, and all the crew (except one man and a boy) were taken out of the "Sarah" and put on board the French ship. The ship "Sarah" was retaken on the 17th of the same December, 1756, by an English privateer: and on the 29th of December, 1756, brought into the port of Biddeford in Devonshire.

The plaintiffs, having insured the ship and their part of the cargo, abandoned the same to the insurers. But the freight, which the owners were entitled to, was not insured.

The defendant had his goods of the recaptors, and paid them 5s. per quintal salvage, at the rate of 10s. per quintal value.

The fish could not be sold at all at Biddeford, nor at any other port in England, for more than 10s. per quintal, clear of all charges and expenses in bringing them to such port. And the most beneficial market (in the apprehension of every person) for disposing of the said cargo of fish, was at Bilboa in Spain, to which place the defendant sent it in the March following; and there was no delay in the defendant in sending the said cargo thither. And it was sold there for 5s. 6d. per quintal, clear of the freight thither, and of all expenses attending the sale there.

The freight from Biddeford to Lisbon is higher than from Newfoundland to Lisbon.

From the time of the capture, the whole way that the ship was afterwards carried was out of the course of her voyage to Lisbon.

The question was, "Whether the plaintiffs are entitled to any, and what freight, and at what rate, and subject to what deduction?"

Mr. *Hussey* for the plaintiffs.

Mr. *Gould* for the defendant.

LORD MANSFIELD said, That though he was of the same opinion at the assizes as he was now, yet he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously, as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: "non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit."

He said, he always leaned (even where he had himself no doubt) to make cases for the opinion of the court: not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of law and the ground upon which they are established certain and notorious: but he took particular care that this should not create delay or expense to the parties, and therefore he always dictated the case in court and saw it signed by counsel, before another cause was called; and always made it a condition in the

rule, "that it should be set down to be argued within the first four days of the term." Upon the same principle, the motion "to put off the argument of this case to the next term," was refused; and the plaintiff will now have his judgment within a few days, as soon as he could have entered it up if no case had been reserved, at the expense of a single argument only; and some rules of the maritime law, applicable to a variety of cases, will be better known. He said, before he entered into it particularly, he would lay down a few principles, viz.:—

If a freighted ship becomes accidentally disabled on its voyage (without the fault of the master), the master has his option of two things; either to refit it (if that can be done with convenient time), or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the House of Lords, in that case of *Lutwidge & How v. Grey et al.*

As to the value of the goods, it is nothing to the master of the ship "whether the goods are spoiled or not." Provided the freighter takes them, it is enough if the master has carried them; for by doing so he has earned his freight. And the merchant shall be obliged to take all that are saved, or none; he shall not take some, and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight; and he may abandon all, though they are not all lost. (I call the freighter the merchant, and the other the master, for the clearer distinction.)

Now here is a capture without any fault of the master, and then a recapture. The merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from Biddeford to Lisbon, than from Newfoundland to Lisbon.

There can be no doubt but that some freight is due, for the goods were not abandoned by the freighter, but received by him of the recaptor.

The question will be "what freight?"

The answer is "a ratable freight," i. e., *pro rata itineris*.

If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro rata*, of the former part of the voyage.

I take the proportion of the salvage here to be half of the whole cargo, upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as

lost. For the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce; and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half the goods must be considered as lost, and half as saved.

Here the master had come seventeen days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for 17/21 parts of the full voyage, for that half of the cargo which was saved.

I find by the ancientest laws in the world (the Rhodian laws), that the master shall have a ratable proportion, where he is in no fault. And *Consolato del Mere*, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron, it has been settled thus. In the *Usages and Customs of the Sea* (a French book), with observations thereon, the fourth article of the Laws of Oleron is, "That if a vessel be rendered unfit to proceed in her voyage, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them, if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage; but if the master can readily repair his ship, he may do it, or if he pleases, he may freight another ship to perform his voyage." Amongst the observations thereon, the first is, "that this law does not relate to a total and entire loss, but only to salvage; or rather, not to the shipwreck, but to the disabling of a ship, so that she cannot proceed in her voyage without refitting; in which case the merchants may have their goods again, paying the freight in proportion to the way the ship made."

The observation adds further, "That if the master can, in a little time, refit his vessel and render her fit to continue her voyage (that is, if he can do it in three days' time at the most, according to the *Hanse-Town laws*), or if he will himself take freight for the merchandise aboard another ship, bound for the same port to which he was bound, he may do it; and if the accident did not happen him by any fault of his, then the freight shall be paid him." The thirty-seventh article of the *Laws of Wisbury* is to the very same purport.

Roccus de Navibus et Naulo, in note eighty-first, says: "*Declara hoc dictum. Ubi nauta munere vehendi in parte sit functus, quia tunc pro parte itineris quo merces inventæ sint, vecturam deberi æquitas suadet; et pro ea rata mercedis solutio fieri debet. Ita Paul de Castro, etc.*" (Then a string of authorities follows.) "*Et probat Joannes de Evia, etc.: qui hoc extendit in casu quo merces fuerint deperditæ (totally lost) una cum navi, et certa pars ipsarum mercium postea fuerit salvata et recuperata; tunc naulum deberi pro rata mercium recuperatarum, et pro rata itineris usque ad locum in quo casus adversus acciderat, fundat, etc.*" (And then he goes on with authorities.) "*Item declara, quod si dominus seu magister navis sol-*

verit mercatori pretium mercium deperditarum, tunc tenetur mercator ad solutionem nauli; quia merces habentur ac si salvatæ fuissent."

In another book entitled *The Ordinance of Lewis the XIV.*, established in 1681 (collected and compiled under the authority of M. Colbert), the same rules are laid down, particularly in the eighteenth, nineteenth, twenty-first, and twenty-second articles. Article eighteenth directs, That no freight shall be due for goods lost by shipwreck, or taken by pirates or enemies. Article nineteenth is, That if the ship and goods be ransomed, the master shall be paid his freight to the place where they were taken; and he shall be paid his whole freight, if he conduct them to the place agreed on, he contributing towards the ransom. (Article twentieth settles the rate of contribution.) Article twenty-first, The master shall likewise be paid the freight of goods saved from shipwreck, he conducting them to the place appointed. Article twenty-second, If he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

And the case in the House of Lords between *Lutwidge & How v. Gray et al.* is also in point, and was well considered there. And Lord TALBOR gave the reasons of the judgment of the House, at length.

Therefore in the present case, a ratable proportion of freight ought to be paid for half the goods.

It is quite immaterial what the merchant made of the goods afterward, for the master hath nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known till after the freight is paid, for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge & How v. Gray*, in the House of Lords; and yet there the tobacco was damaged very greatly, even so much that a great part of it was burnt at the scales at Glasgow.

Therefore the verdict must be for £60 14s., which, upon computation, amounts to the ratable proportion of the freight, being 17/21 of £75, the half of £150.

Consequently, the verdict which was for £70, must be set right, and made £60 14s.¹

Let the postea be delivered to the plaintiff.

¹Of this decision Chancellor KENT says: "Lord MANSFIELD, at a very early period of his judicial life, introduced to the notice of the English bar the Rhodian Laws, the *Consolato del Mare*, the laws of Oleron, the treatises of Rocca, the laws of Wisbuy, and, above all, the marine ordinances of Louis XIV., and the commentary of Valin. These authorities were cited by him in *Luke v. Lyde*, and from that time a new direction was given to English studies, and new vigor and more liberal and enlarged views communicated to forensic investigations" (3 Commentaries, 19).

Mr. Carver in his *Carriage of Goods by Sea* (4th ed.) § 560, says: "It may be doubted whether the grounds given for this decision [*Luke v. Lyde*] can

MACKRELL v. SIMOND & HANKEY.

KING'S BENCH, 1776.

[*Abbott on Shipping* (5th Ed.), 333.¹]

IN an action of covenant on the charter-party, in the first count of which the plaintiff claimed freight for the period of the voyage to *Grenada*; in the second up to the day of loss of the ship. The defendants demurred. Judgment was given for the plaintiff on the first count, and for the defendant on the second.

Mackrell, the owner of a ship called the *Richard*, lying in the river *Thames*, let his ship to freight by a charter-party, dated 9th March, 1774, to *Simond & another* "by the month, for such time as she should be employed in performing a voyage from *London* to *Plymouth*, and the island of *Grenada*, and from thence back to *London*," whereby the plaintiff covenanted, "that the ship should, pursuant to the orders and directions of the freighters, their factors or assigns, prosecute and perform the voyage above-mentioned, (the dangers and perils of the sea, and the restraint of princes and rulers excepted), and should in such outward and homeward voyage load and unload all lawful goods:" and that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes as customary at the island of *Grenada*, and that he would pay all port-charges and pilotage. In

now be regarded as satisfactory." And see Judge KEENER's adverse criticism from the standpoint of quasi-contracts in his Treatise, 253.—Ed.

¹In the preface to the first edition of *Abbott on Shipping* (1802) the learned author, later Lord Chief Justice of the King's Bench, said: "The case of *Mackrell* against *Simond* and *Hankey* was communicated to me by the late Mr. Justice BULLER, who, when at the bar, argued it on behalf of the defendants."

But in *Appleby v. Dods* (1807) 8 East, 300, Lord ELLENBOROUGH refused a recovery for wages on outward because the vessel was lost on the homeward voyage. It is true that the contract provided for payment only upon return to home port, but inasmuch as freight was earned upon the outward voyage, and freight is, or rather was, the mother of wages, there was a fund out of which the wages could have been paid, and the seaman's labor had either added to or created this fund. Add to this the fact that the express clause about payment was inserted to prevent desertion in the West Indies, and, the seaman's right to recovery seems too plain for argument.

At the present day the rule that freight is the mother of wages is expressly abrogated in the United States (Rev. St. U. S. § 4525) and in case of the loss of vessel, the seaman is entitled to wages earned until time of such loss (Rev. St. U. S. § 4526). For English and American law on this subject and citation of authorities, see 25 Am. & Eng. Encey. of Law (2d ed.) 96 *et seq.*—Ed.

consideration whereof, the defendants covenanted that they "would load and unload the ship, and give the master proper orders in respect thereof: and that the ship should be discharged out of her said monthly employ on the delivery of her homeward cargo in *London*, and also should and would well and truly pay or cause to be paid to the said owner, his executors, administrators, or assigns, in full for the freight and hire of the said ship at the rate of £110 sterling *per* calendar month, for all such time as the said ship should be taken up in performing the voyage aforesaid, to commence and be accounted from the day of the date of the said charter-party, and to end and determine on the day of the discharge of the homeward cargo at *London*, and to be paid one-third part thereof on her report inwards at the Custom-house, *London*, and the remaining two-third parts thereof in two calendar months then next following."

In pursuance of this charter-party, the ship took in goods belonging to the merchants *Simond & Hankey* at *London*, sailed with them to *Plymouth*, and there took in other goods belonging to them, and from thence proceeded to *Grenada*, and there landed the cargo; and received another cargo from the merchant's factor there, with which she set sail for *London*; but on the way was lost by tempest. The voyage to *Grenada* occupied *three* months; and *five* months elapsed in the whole before the loss of the ship: after the misfortune the owner brought an action against the merchants, claiming of them the payment of freight either for *three*, or for *five* months. The merchants insisted that nothing was due. The Court decided that freight was payable for *three* months, the period of the outward voyage.

And Lord MANSFIELD delivered his judgment to the following effect: "This question depends upon the construction of the charter-party. If the parties have expressed their meaning defectively, the Court must be guided by the nature of the thing. The charter-party puts no case but that of a prosperous voyage out and home; it provides for freight on the supposition that the ship will arrive safe and report her cargo; no provision is made for any other case. If the ship be cast away on the coast of *England*, and never arrive at the port of *London*, yet if the goods are saved, freight shall be paid, because the merchant receives advantage from the voyage. This is not expressed by the charter-party, but arises out of the equity of the case. Freight is the mother of wages, the safety of the ship the mother of freight: that is the general rule of the maritime law. If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost; and by express agreement the parties may make the outward and homeward voyage one. Nothing is more common than two voyages; wherever there are two voyages, and one is performed, and the ship is lost in the homeward voyage, freight is due for the first. Here the outward and homeward voyage are so

called in the charter-party. The cargo is loaded outwards, and the owner covenants to pay port-charges on the outward voyage. The whole of that voyage was completed: port-duties are incurred and paid. Nothing however is due on the homeward voyage, though the ship might be out a month."

RICHARDSON ET AL. v. YOUNG ET AL.

SUPREME COURT OF PENNSYLVANIA, 1861.

[28 *Pennsylvania State*, 169.]

CERTIFICATE from the Court of Nisi Prius.

This was a foreign attachment by John G. Richardson and Joseph Richardson, trading as Richardson Brother & Co., against Stephen Young Smith, C. Cox, and Horatio Stevens, in which Stephen Baldwin & Co. were summoned as garnishees.

The plaintiffs filed their declaration in *assumpsit*, containing two counts, one for money had and received by defendants for the use of plaintiffs, and the other for money due and owing on an account stated; to which defendants pleaded *non assumpsit*, payment with leave, &c., and set-off; and on the issue thus formed the parties went to trial.

The case was this: In the month of February, 1856, the plaintiffs shipped on board the ship *Tigress*, then lying in the port of Philadelphia, 14,125 bags of corn, which was owned by them, to be carried and delivered to the plaintiffs in Liverpool; which ship *Tigress* was owned by the said defendants. The terms of the contract of affreightment were contained in the bills of lading. On the 24th day of March, 1856, the *Tigress* sailed from Philadelphia, bound for Liverpool, having the said corn on board, and having her cargo properly stowed and secured, and being seaworthy in every respect, in charge of a pilot. While passing down the Delaware, she encountered floating logs and ice, by which the bow-port was stove in. The vessel began to fill and sink, and in order to save her she was stranded. The cargo, including plaintiff's corn, was taken out, transferred to lighters, and brought back to Philadelphia in a wet and damaged state. The corn was surveyed and condemned to be sold for account of those concerned, under writs of survey issuing out of the District Court of the United States for the Eastern District of Pennsylvania, and was accordingly so sold by the master of the *Tigress* for the sum of \$7,687.29.

A general average statement was made, by which the loss payable on the said corn was \$1,055.

This action was brought to recover the amount of the sale of the

corn, less the said average loss of \$1,055, and the sum of \$1,033.04 paid to them by defendants on the 3d May, 1856, on account.

The defendants claimed to set off the sum of \$6,425.17, with interest from ——— 1856, for and as the amount due by the plaintiffs to the defendants for the freight upon the said corn from Philadelphia to Liverpool.

The court (STRONG, J.) directed the jury to find a verdict for the plaintiffs for the whole amount of their claim, \$6,837.60, reserving the question whether, upon the whole evidence given, the defendants were entitled to freight upon the said corn, for the opinion of the court in banc.

The opinion of the court was delivered, February 4th, 1861, by

WOODWARD, J. At the argument of this cause I was not sure but that some peculiarity attached itself to the contract of affreightment, whereby a shipowner, who had undertaken the conveyance of merchandise and been prevented by the perils of the sea from delivering it according to the consignment, would be entitled to recover from the shipper either full freight, or freight *pro rata itineris*. But upon looking into the authorities, I am satisfied that no peculiarity distinguishes the contract of affreightment from that class of contracts which the law treats as executory and entire contracts. The settled doctrine of the English and American cases is, that entire contracts must be fully performed, and cannot be apportioned, although a new contract may be implied from the voluntary acceptance of services or performance different from that for which the original contract provided. *Cutter v. Powell*, 6 Term R. 320, and the notes thereto, in 2 Smith's Lead. Cases, Am. ed., pp. 1-45. That this doctrine is as applicable to freight as to other things, may be seen from the cases collected and commented on by Judge STORY in the note on page 547 of his edition of Abbott on Shipping, and in the note to the case of *Vlierboom v. Chapman*, 13 M. & W. 239, Am. edition.

But the best cases I have found are in our own books. In *Hurtin v. The Union Insurance Co.*, 1 W. C. C. R. 530, Judge WASHINGTON laid down the law in these few and simple words: "If the cargo is not conveyed to its place of destination, no freight can be demanded. If voluntarily accepted at any other port by the owner or his supercargo, freight *pro rata itineris* is due."

The case of *Amroyd v. The Union Insurance Co.*, 3 Binn. 444, is to the same effect. So is the case of *Callender v. The Insurance Co. of North America*, 5 Binn. 525, wherein Chief Justice TILGHMAN, after discussing Lord MAXFIELD's celebrated case of *Luke v. Lyde*, 2 Burrow, 883, says, "it seems to have been understood that *pro rata* freight is not due, unless the consent of the merchant, either by words or actions, has been expressly given, or may be fairly deduced, to accept his goods at an intermediate port, and such consent being given, the original contract is dissolved, and a new one arises."

In the case of *Gray v. Wain*, 2 S. & R. 229, the same doctrine was applied, and a *pro rata* freight allowed, because upon the whole evidence it was impossible to entertain a doubt that the cargo was voluntarily received by the supercargo at a port short of the ship's destination. These Pennsylvania cases contain a very full discussion, both at bar and on the bench, of all the learning on the subject.

Now, upon these principles, it is perfectly plain that the defendants were entitled to no set-off, either for full or partial freight. They undertook to carry the plaintiff's corn from Philadelphia to Liverpool, aboard the ship *Tigress*. A few hours out of port, the vessel was stranded, without fault of the master or crew. The plaintiffs' corn was taken out, transferred to lighters, brought back to Philadelphia in a wet and damaged condition, and was surveyed and condemned to be sold for account of all concerned. All this occurred without notice to the plaintiffs, and without assent or action of any sort on their part. Not a declaration or circumstance was alleged or shown from which a new contract could be supposed to arise. And this distinguishes the case from that of *Jordan v. The Warren Insurance Co.*, 1 Story, 342, in which the dictum of Judge STORY, so much relied on by the learned counsel of the plaintiffs in error, is found, for that was in reality a case of "*mutual voluntary agreement on the part of the master and the shippers, that the damaged cargo should be sold.*" But here, so far from there being any such agreement, there was not even a notice, by the master to the shippers, of damage to the corn, or of the condemnation and sale of it. The case is bare of any circumstance from which the plaintiffs' acceptance of part performance can be inferred.

But, it is said, the master is the agent of the shippers. For some purposes he is. He may, under stress of weather, remove the cargo into another vessel that may chance to be at hand, and if done in good faith, he will not be liable, though his own ship outside the storm and the other perish. He may in some circumstances hypothecate the cargo, or sell part of it, or after condemnation, the whole of it, as in this case. But, in the language of Judge STORGE, "he is not the agent of the owners of the cargo, with power to relieve the shipowners from their obligation to convey according to the contract of affreightment. *Vlierboom v. Chapman*, 13 M. & W. 230, asserts that he is not, pointedly and directly." I may add, that to treat him as the agent for the shippers for such a purpose, would confound all our ideas of contracts; for how is a man to contract with himself? As agent of the shipowners, he may enter into the contract of affreightment with the shippers; and then if, as agent of the shippers, he may modify or annul that contract, or make a new one, it is self-evident that his mere will is substituted for the contract of affreightment.

The learned judge was right in ruling that the receipt by the

plaintiffs of a portion of the proceeds of the sale of the corn, amounted to no voluntary acceptance of the cargo at Philadelphia. A similar implication of a new contract was attempted to be set up in *Amroyd v. The Insurance Company*, before referred to; but, said Judge TILGHMAN, "it is no answer to the defendant's objection to say that they have ratified the sale of the goods by accepting the proceeds. What else could they do? If they had refused the proceeds, they might have got nothing. They never were consulted about the sale." These observations apply with decisive force to this point of the plaintiffs in error's case. The plaintiffs were not consulted about the sale. They had no part in adjusting the general average account, nor did they receive the thousand and odd dollars on the foot of it. I do not mean that this sum did not result from that account, but there was no evidence to show that the plaintiffs had ever seen the account, or meant to ratify it by receiving what was apportioned to them. They received it, as a drowning man catches at straws, as the best that could be got; but under the circumstances we are not to imply from their receipt of it, that new contract in virtue of which alone they would be liable for freight.

Now, as to the bills of exception to evidence. The two notices of 14th April, 1856, apparently the first intimation the plaintiffs had of the disaster, were subsequent to the sale of the corn, which fixed the rights of all parties. The receipt of such notices, even less than the receipt of the partial payment above mentioned, would ground a presumption of a new contract, and the evidence was therefore properly rejected as irrelevant.

So was the other piece of evidence in regard to the beeswax of Raphael & Co. They received it back from the *Tigress*, and reshipped it by another vessel at the cost of the owners of the *Tigress*. Had the owners of the corn done the same in respect to their portion of the cargo, they would have made themselves liable for full freight; but since they did not, they could not be made liable by what Raphael & Co. did with their beeswax.

The judgment is affirmed.¹

¹See in accord with the principal case: *Liddard v. Lopes* (1809) 10 East, 526; *Hopper v. Burness* (1876) L. R. 1 C. P. 137; *Metcalf v. Britannia Iron Works Co.* (1876) L. R. 1 Q. B. D. 613. The dissenting opinion of Cockburn, C. J., in this latter case is certainly sound from the standpoint of quasi-contracts.—Ed.

NEW YORK LIFE INSURANCE COMPANY *v.* STATHAM
ET AL.SAME *v.* SEYMS.MANHATTAN LIFE INSURANCE COMPANY *v.* BUCK, EX-
ECUTOR.

SUPREME COURT OF THE UNITED STATE, 1876.

[93 *United States*, 24.]

THE first of these cases is here on appeal from, and the second and third on writs of errors to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several

days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an ex-

ecutory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party, — an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex aequo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex aequo et bono* to recover the equitable value of the policies with interest from the close of the war.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of his opinion.

WAITE, C. J. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds: but they hold at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender: and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice HUNT, dissenting.

When the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace

ensues: and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.¹

CUTTER, ADMINISTRATRIX OF CUTTER v. POWELL.

KING'S BENCH, 1795.

[6 *Term Reports*, 320.]

To assumpsit for work and labor done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for £31 10s., subject to the opinion of this court on the following case.

The defendant being at Jamaica subscribed and delivered to T. Cutter the intestate a note, whereof the following is a copy: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship Governor Parry sailed from Kingston on the 2d of August, 1793, and arrived in the port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2d day of August, and proceeded, continued, and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is four pounds per month: but when sea-

¹In regard to the influence of war on life insurance policies, it may be said that three essentially distinct views have been held by courts of last resort, and reference is made to *Abell v. Penn. Mutual Life Ins. Co.* (1881) 18 W. Va. 400, 423-435 for their enumeration, and criticism of the authorities cited.

In *Semmes v. Hartford Ins. Co.* (1871) 13 Wall. 158, the action was upon a policy of fire insurance containing the express stipulation that no suit should be sustainable thereunder unless brought within twelve months after the loss or damage occurred. The civil war broke out during the twelve months within which the suit should and no doubt would have been brought. As it was impossible to bring suit during the war, this condition was not performed. It was held by the court that the condition was entire and not divisible; that as performance became impossible by operation of law, the assured was entirely relieved from the obligation of bringing suit within the twelve months; that the action could, therefore, be maintained within the statute of limitations. See *Wambaugh, Cases on Insurance* (1902) 651, note, for an exhaustive citation of adjudicated cases.—Ed.

men are shipped by the run from Jamaica to England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by *J. Heywood* for the plaintiff: but the court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage one way or the other; but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

LORD KENYON, C. J. I should be extremely sorry that in the decision of this case we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued, and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHMURST, J. We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written

contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued, however, that the plaintiff may now recover on a *quantum meruit*; but she has no right to desert the agreement; for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question; the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

GROSE, J. In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much relied upon. I have looked into the laws of Oleron, and I have seen a late case on this subject in the Court of Common Pleas, *Chandler v. Greaves*, Hil. 32 Geo. 3 C. B. I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage, otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favorable to the seamen; so much so that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages after deducting what has been laid out for him. In the case of *Chandler v. Greaves*, where the jury gave a verdict for the whole wages to the plaintiff, who was put on shore on account of a broken leg, the court refused to grant a new trial, though I do not know the precise grounds on which the court proceeded. However in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage, instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now

recover anything. I believe, however, that in point of fact, these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

LAWRENCE, J. If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. In *Salk*, 65, there is a strong case to that effect; there debt was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him £100 per annum for his service; the plaintiff showed that the defendant's testator died three-quarters of a year after, during which time he served him, and he demanded £75 for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt it could not be divided; and this court were of that opinion, and reversed the judgment. With regard to the common case of an hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the impressed man, perhaps it is an excepted case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owners of the ship.

Postea to the defendant.

unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term; but the case was not mentioned again¹

¹"When one party to a special entire contract has not complied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him, which he has accepted, no action will lie on that contract for the work done or thing delivered; but the party, who has thus been benefited by the labor or property of the other, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him. Thus the rules of pleading in regard to special contracts are preserved, and no injustice is done. The following authorities support this position, and the more particular views we have taken of the subject. 1 Chitt. Pl. 325; 1 Saund. 320, n. 4; *Cook v. Jennings*, 7 T. R. 377;

PARKER v. MACOMBER.

SUPREME COURT OF RHODE ISLAND, 1892.

[17 *Rhode Island*, 674.]

DEFENDANT'S petition for a new trial.

Providence, April 11, 1892. DOUGLAS, J. This is an action of *assumpsit* brought to recover compensation for board, maintenance, care, and nursing for 390 weeks, from April 1, 1881, to October 1, 1888, at \$5 per week, \$1,950. The declaration contains the common counts in *indebitatus assumpsit* for goods sold and delivered, work and labor, money had and received, and for interest.

The jury returned a verdict for the plaintiff and assessed his damages at \$1,072.50, being at the rate of \$2.75 per week for 390 weeks. It appeared that the services rendered were induced by a parol agreement between the parties by which the plaintiff agreed that he and his wife should live in the house of the defendant, and care for and maintain her during her natural life, and the defendant agreed in consideration of these services that she would charge no rent for the house, would pay \$8 per month board, and would give the house and leasehold interest in the lot to the plaintiff at defendant's death. She did not pay the board as agreed, but did pay some milk bills for the plaintiff on account.

Plaintiff's wife died February 13, 1888, and from that time he furnished housekeepers. In August, 1888, defendant notified plaintiff to leave the house, and he removed October 1.

Evidence was introduced, against the objection of defendant, of the value of the services rendered.

Little v. Holland, 3 T. R. 590; *Shipton v. Casson*, 5 B. & C. 382; *Oxendale v. Wetherell*, 9 B. & C. 386; *Sinclair v. Bowles*, *id.* 92; *Cooke v. Munstone*, 1 N. R. 351; *Parmeter v. Burrell*, 3 C. & P. 144; *Bull. N. P.* 139; *Osgood v. Groning*, 2 Campb. 466; *Lucas v. Godwin*, 3 Bingham N. C. 737; *Sinard v. Patterson*, 3 Blackf. 353, and note; *Linningdale v. Livingston*, 10 Johns. 36; *Conby v. Ingersol*, 4 Blackf. 493."—*Lowax v. Bailey* (1845) 7 Blackf. 599, 603.

As to the apportionment of contracts, see note to *Cuthbert v. Kuhn* (1837) 31 Am. Dec. 513, 517 *et seq.*; and as to performance of entire contract as a condition precedent to recovery, see note to *Catlin v. Tobias* (1863) 84 Am. Dec. 183, 188.

On measure of recovery in such cases, see *Hillyard v. Crabtree's Adm's* (1854) 11 Tex. 264, S. C. 62 Am. Dec. 475 and note; *Clark v. Gilbert* (1860) 32 Barb. 576 (holding that if services are worthless, there can be no recovery).

For an elaborate note to the principal case, collecting the English authorities on the subject, see 2 Sm. Lead. Cas. (9th Am. ed.) 1212 *et seq.*—Ed.

The defendant now prays for a new trial on the ground that the services were performed under an entire contract, which was not completed by the plaintiff because of the death of his wife, whose personal attendance formed an essential part of the consideration of it, and because the evidence objected to was inadmissible under the declaration.

The plaintiff contends that after the death of his wife the same services were rendered by the housekeepers whom he engaged, and that he was prevented from completing the contract by the defendant, who ejected him from the house, and not by his wife's death.

The questions which are raised by the petition are, whether the plaintiff can recover what his services are reasonably worth, notwithstanding the making of the contract, and, if so, whether this declaration is sufficient without a count in *quantum meruit* to admit evidence of the value of the services, and to sustain a judgment therefor.

We cannot doubt that, when this action was brought, the agreement had been annulled, if it ever had had any validity.

If the leasehold interest were for a term exceeding one year, the agreement amounted to an attempt to convey an interest in real estate by parol, and was void under the statute of frauds.

In such case, as the defendant refused to continue the arrangement, whether justifiably or not, the plaintiff is entitled to recover the value of his services already rendered. *Lockwood v. Barnes*, 3 Hill. N. Y. 128; *King v. Welcome*, 5 Gray, 41.

While it seems to be assumed that the lease was for a long term, and the probabilities of the situation lead us to the same supposition, unfortunately there is no evidence reported which enables us to find the fact, and we cannot presume that the agreement was void without proof.

We must therefore consider the agreement as originally binding, and determine the right of the parties upon that view of the case.

If the plaintiff was prevented from continuing his contract by the arbitrary act of the defendant, he may disregard it and recover the value of the services he has rendered in partial performance of it. *Greene & Brown v. Haley*, 5 R. I. 260. If the death of the plaintiff's wife was a substantial failure of the consideration, then the defendant was justified in rescinding the contract, as the full performance of it on the part of the plaintiff had become impossible. We think such was the case. The personal services and attentions of the wife to the defendant, who was the plaintiff's aunt, were undoubtedly contemplated by the parties as more agreeable and efficient than the services of strangers could be, and may well be considered an essential part of the benefits which the defendant was to receive. *Yerrington v. Greene*, 7 R. I. 589; *Knight v. Bean*, 22 Me. 531; *Spalding v. Rosa*, 71 N. Y. 40; *Stewart v. Loring*, 5 Allen, 306.

The question is, then, presented whether a person who has rendered personal services under an entire contract, which the act of God has

prevented him from fully performing, can recover upon an implied *assumpsit* what those services are reasonably worth.

In case of the destruction of the fruits of the service so that neither party has the value of them, the loss must be adjusted according to the scope of the contract and the circumstances of the case, and different courts may come to diverse conclusions in cases which are very similar to each other. But when, as in this case, the defendant has received and retains the benefit of the service, we think that the plaintiff should recover. It is not just that one should benefit by the labor of another and make no return, when the event which ends the service happens without the fault of either party, and is not expressly or impliedly insured against in the agreement which induced the labor. This conclusion seems now to be established by authority, as well as to rest in sound reason. We know of no case which holds that, if the special agreement is no longer binding, the plaintiff may not resort to a *quantum meruit*. The leading case of *Cutter v. Powell*, 6 Term Rep. 320, held the special contract not to have been annulled by death, and there were circumstances connected with the agreement which gave color to that construction. The contract was, to perform a voyage for a compensation, to be paid upon arrival, largely in excess of the ordinary wages for such services. The sailor died before the voyage was finished, and it was held that his administrator could not recover anything. The King's Bench seem to have felt the harshness of the rule they were bound by, even in that case, and caused inquiry to be made if some custom of the maritime law might not be found to mitigate the severity of the contract, but at the end of the term, no such usage having been found, they gave judgment for the defendant.

W. W. Story says of this decision: "But this case may be explained by the fact that the thirty guineas was an extra price for the voyage, much larger than the ordinary wages would amount to for the length of such a voyage, and that both parties understood and intended that the contract should be entire, and that the sailor should take the risk of the whole voyage. In other tribunals, and where there is no expressly entire contract, the death or sickness of the laborer is a sufficient excuse for non-performance, and he may recover *pro tanto* for the time he has labored." 1 Story on Contracts, 19. Smith's Leading Cases, 9th Amer. ed. 1238, in the note to *Cutter v. Powell*, say: "The death of either party puts an end to a contract for personal services unless it is otherwise agreed." President Tucker, of the Virginia Court of Appeals, referring to the same case, says: "That case can only be sustained, I think, on the ground principally relied on of extra wages. But notwithstanding these and other cases which rigorously deny compensation unless there is entire performance, there can be no doubt that when the subject is divisible, when the failure as to part can be fairly and accurately compensated by an apportionment of the

consideration, the law permits, as justice certainly requires, that it should be done." *Bream v. Marsh*, 4 Leigh, 21, 29.

In *Haynes, Spencer & Co. v. Sec. Baptist Church of St. Louis*, 12 Mo. App. 536, 539, it is said by the court: "If money is to be paid when the work is done, non-performance of the work is a good defence; and where there has been a partial performance only, and not a performance of what is substantial in the contract, as a general rule plaintiff cannot recover. The rule always applies when the non-performance is voluntary on the plaintiff's part. But when the non-performance is caused by the defendant, or by the act of God, the rule is not always applied, and in this country *Cutter v. Powell* has not been followed, but, in contracts for service, sickness and death have been held to excuse the non-performance of an entire contract." See, also, *Carpenter v. Gay*, 12 R. I. 306; *Farrow v. Wilson*, L. R. 4, C. P. 744.

Wolfe v. Howes, 20 N. Y. 197, is clearly analogous to the case at bar. The plaintiff's declaration contained the common counts only for work, labor, and services rendered by his testate, as a skilled workman, to the defendant. A contract was set up in defence by which the testator had agreed to work a year at \$40 per month, \$10 of which was to be paid monthly. Before the end of the year he became unable to work from sickness, and so continued till his death. It was held by the referee that, by reason of this sickness and death of the workman, he was discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for his services preceding the sickness. The Supreme Court affirmed the decision, and the Court of Appeals, after a careful examination of the authorities, held that the contract contemplated the personal services of the workman, and that full performance, being prevented by sickness or death, was not a condition precedent to the right to recover, and laid down the general proposition that one who, under a contract requiring his personal services, and providing for partial payment during the employment and the remainder at the end of the term, performs services valuable to the employer, but before the expiration of the stipulated period is disabled by sickness from completing his contract, is entitled to recover as upon a *quantum meruit* for such services as he rendered.

ALLEN, J., p. 200, in considering the case of *Cutter v. Powell*, says it "is distinguishable in this, that, by the peculiar wording of the contract, it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and to render at all hazards his personal services during the voyage, before the completion of which he died."

See, also, to the same general effect, *Fuller v. Brown*, 11 Mete. 440; *Seaver v. Morse*, 20 Vt. 620; *Fenton v. Clark*, 11 Vt. 557, 5 *Lawyers' Rep.* annotated 707, note; *Clark v. Gilbert*, 26 N. Y. 279; *Coe v.*

Smith, 4 Ind. 79; Hubbard v. Belden, 27 Vt. 645; Patrick v. Putnam, 27 Vt. 759; Lakeman v. Pollard, 43 Me. 463; Ryan v. Dayton, 25 Conn. 188; Green *et al* v. Gilbert, 21 Wisc. 401; Dane's Abridg. cap. 9, art. 22, §§ 17, 18.

The question remains whether the plaintiff's declaration is sufficient without the count in *quantum meruit*.

We think it is sufficient. A count in *quantum meruit* as well as one in *indebitatus assumpsit* for work, labor, skill, care, and diligence, etc., claims a certain sum as due. In either case the plaintiff may recover less, and the judgment is for so much of his stated claim as is found to be justly merited. The counts in *quantum meruit* and in *quantum valebat* are therefore unnecessary in any case. 1 Chitty on Pleading, 352, 353.

The petition for a new trial must be denied and dismissed.¹

¹An act of God generally excuses the performance of a contract, Baldwin v. Ins. Co. (1858) 3 Bosw. 530; People v. Tubbs (1868) 37 N. Y. 586; New Haven & Northampton Co. v. Quintard (1869) 6 Abb. Pr. N. S. 128; Hare, Contracts, 637 *et seq.*; Page, Contracts, § 1362 and cases cited. Otherwise if the act could have been foreseen, Worth v. Edmunds (1868) 52 Barb. 40.

Accordingly death may terminate a contract, Babcock v. Goodrich (1879) 3 How. Pr. N. S. 52, 54, and a contract so determined may be apportioned. George v. Elliott (1806) 2 Hen. & M. 5; Townsend v. Hill (1857) 18 Tex. 422. Where the contract is apportionable, a recovery should be permitted for the part performed. Coe v. Smith (1853) 4 Ind. 79, S. C. 58 Am. Dec. 618 and note; Stubbs v. Holywell Ry. Co. (1867) L. R. 2 Ex. 311; Seymour v. Cagger (1878) 13 Hun. 29; Lacy v. Getman (1890) 119 N. Y. 109; Landa v. Shook (1895) 87 Tex. 608.

So, also, the existence in the neighborhood of an epidemic, contagious disease likely to produce death, or circumstances likely to result in serious bodily harm, Lakeman v. Pollard (1857) 43 Me. 463; Walsh v. Fisher (1899) 102 Wis. 172. And compare the following cases: Dewey v. Union School District (1880) 43 Mich. 480; Gear v. Gray (1894) 10 Ind. App. 428; Stewart v. Loring (1862) 5 Allen, 306; Libby v. Douglas (1900) 175 Mass. 128; Ellis v. Midland Ry. Co. (1882) 7 Ont. App. 464.

So, also, sickness will excuse the performance of a contract, Dickey v. Linscott (1841) 20 Me. 453; People v. Manning (1828) 8 Cow. 297; Spalding v. Rosi (1877) 71 N. Y. 40; Robinson v. Davison (1871) L. R. 6 Ex. 269; Ponsard v. Spiers & Pond (1876) L. R. 1 Q. B. D. 410, unless it should have been foreseen, Jennings v. Lyons (1876) 39 Wis. 553 (where a woman was confined within four months after the making of a contract for a year's service); Rex v. Hales Owen (1718) 1 Str. 99; and a recovery is permitted for services performed before sickness, Hubbard v. Belden (1855) 27 Vt. 645; Faby v. North (1855) 19 Barb. 341; Ryan v. Dayton (1856) 25 Conn. 188; Coden v. Farwell (1867) 98 Mass. 137; Harrington v. Iron Works Co. (1875) 119 Mass. 82; McClellan v. Harris (1895) 7 S. Dak. 447; and see notes to Wolfe v. Howes (1859) 75 Am. Dec. 388, and Clark v. Gilbert (1863) 84 Am. Dec. 189; Cuckson v. Stones (1859) 1 E. & E. 248; Boast v. Firth (1868) L. R. 4 C. P. 1. But where, by the terms of the contract, notice of the disability

JONES AND JONES v. JUDD.

COURT OF APPEALS OF NEW YORK, 1850.

[4 *Comstock*, 412.]

JAMES JONES and Edward Jones sued Judd in the Common Pleas of Cattaraugus county, for the price of work and labor. The defendant contracted with the State to complete certain sections of the Genesee Valley Canal. On the 14th of September, 1840, he entered into a sub-contract with the plaintiffs for a part of the same work, by which he agreed to pay them seven cents per yard for excavating and eight cents for embankment, monthly, according to the measurement of the engineers, except ten per cent. which was not to be paid until the final estimate. The work on the canal, including that on which the plaintiffs were engaged, was stopped by the canal commissioners on the 21st day of June, 1841, before they had completed their job, and they never finished it. On the 29th of March, 1842, the legislature passed the act "to preserve the credit of the State," which put an end to the original contract between the defendant and the State, and before the commencement of this suit that contract had expired by its own limitation. The defendant paid the plaintiffs for all the work performed by them except the ten per cent. reserved, which amounted to \$85.30, which sum the plaintiffs claimed to recover.

The defendant moved for a nonsuit on the ground, among others, that without a waiver of full performance of the contract, or without some act of his to prevent the performance, the plaintiffs could not recover. The motion was overruled. The defendant then proved that the work actually done by the plaintiffs under the contract was worth only five cents for embankment and seven cents for excavation. He offered also to prove what the cost of the work not done would be, and that the excavation and embankment not done would be more difficult and expensive than the portion completed. This evidence was objected to and excluded. The referees before whom the trial was had reported in the plaintiffs' favor for the sum claimed. The Common Pleas confirmed their report, and rendered judgment thereon, which was affirmed by the Supreme Court, on error brought. The defendant appealed to this court.

GARDINER, J. The plaintiffs were stopped in the prosecution of the work, in fulfilment of their contract, by the authority of the State officers. Before this injunction was removed, the law of March 29,

was to be given, and such notice was not given, a recovery was denied. *Noon v. Salisbury Mills* (1862) 3 Allen, 340, but see *Fuller v. Brown* (1846) 11 Met. 440.—ED.

1842, for preserving the credit of the State, was passed, which put an end to the original contract, and the agreement between the plaintiffs and defendant which grew out of it. 3 Mass. 331; *Doughty v. Neal*, 1 Saund. R. 216, note b, 5th Ed.; 10 Johns. 28.

As the plaintiffs were prevented, by the authority of the State, from completing their contract, they are entitled to recover for the work performed, at the contract price. The ten per cent. was a part of the price stipulated. It was reserved to secure the fulfilment of the contract, and to be paid upon a final estimate. The performance of the required condition became impossible by the act of the law, and of course the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular. Comyn on Cont. 50; 10 Johns. 36.

Upon the question of damages; I think the offered evidence was properly rejected. If the contract had been performed by the plaintiff, he might have recovered upon the special agreement, or upon the common counts, and in either case he would be entitled to the price fixed by the agreement. Phil. Evid. 109, 2d Ed.; *Dubois v. Del. & H. Canal Co.*, 4 Wend. 280, and cases cited. If the performance had been arrested by the act or omission of the defendants, the plaintiff would have had his election, to treat the contract as rescinded, and recover on a *quantum meruit* the value of his labor, or he might sue upon the agreement, and recover for the work completed according to the contract, and for the loss in profits or otherwise which he had sustained by the interruption. *Linningdale v. Livingston*, 10 Johns. 36; 9 B. & C. 145; *Masterton v. The Mayor of Brooklyn*, 7 Hill, 69, 75. In this case the performance was forbidden by the State. Neither party was in default. All the work, for which a recovery is sought, was done under the contract, which fixed a precise sum to be paid for each yard of earth removed, without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant. 7 Hill, 71, 73. The defendants, in the language of Judge BEARDSLEY, "are not by their wrongful act to deprive the plaintiff of the advantage secured by the contract." Here, there was no breach of the agreement by either party. The plaintiffs could not recover profits, and the defendant cannot, consequently, recoup them in this action. *Blanchard v. Ely*, 21 Wend. 316.

Again: the plaintiffs assumed the risk of all accidents which might enhance the expense of the work, while the contract was subsisting (*Boyle v. Canal Co.*, 22 Pick. 384; *Sherman v. Mayor of New York*, 1 Comst. 321), and are entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work by State

authority was an accident unexpected by either party. It was one which, under the offer, we are bound to assume, was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price, for what has been done, unless he could demand it in case a flood had partially excavated or embanked the section of the canal to be completed by the plaintiffs. The judgment must be affirmed.

JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, C. J., RUGGLES, HARRIS, and TAYLOR, JJ., were for reversal, on the ground that the evidence offered upon the question of damages was improperly excluded.

*Judgment affirmed.*¹

MENETONE v. ATHAWES.

KING'S BENCH, 1764.

[3 *Burrow*, 1592.]

THIS was an action by a shipwright for work and labor done and materials provided, in repairing the defendant's ship. And the question was, "Whether the plaintiff was entitled to recover, under the following circumstances."

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday; in the interim, viz., on the day before, and when only three hours' work was wanting to complete the repair, a fire happened at an adjacent brew-house, and was communicated to the dock; and the ship was burnt.

¹Accord: *Melville v. De Wolf* (1855) 4 B. & E. 844; *Cross v. Hyne* (1868) 18 L. T. N. S. 474; *Heine v. Meyer* (1871) 61 N. Y. 171 (expressly following the principal case).

As to the effect of a subsequent statute that changes the nature of an obligation which at the time of making was either lawful or unlawful, see *Dyer*, 27, p. 178; *Brewster v. Kitchell* (1698) 1 Salk. 198, S. C. 1 Ld. Raym. 317; *Comb.* 424, 466; *Holt*, 175, 669; 12 Mod. 166; *Brown v. Mayor* (1861) 9 C. B. N. S. 726; *Baily v. De Crispigny* (1869) L. R. 4 Q. B. 180; *Brick Presbyterian Church v. New York* (1826) 5 Cow. 538.

The effect on a contract, of an act of the home government, is shown by the cases of *Wiggins v. Ingleton*, and *Chandler v. Meade* (1705) reported in 2 Ld. Raymond, 1211 as follows: "In an action brought for mariner's wages for a voyage from Carolina to London, it appeared that the plaintiff served three or four months, and, before the ship came to London, which was the delivering port, he was impressed into the Queen's service; and afterwards the ship arrived at the delivering port. And ruled by *HOLT*, on evidence at Guildhall, that the plaintiff should recover pro tanto as he served, the ship coming

N. B. It was the shipwright's own dock, and the owner of the ship had agreed to pay him £5 for the use of it.

This case was argued on Tuesday, the 13th of this month, by Mr. *Murphy*, for the plaintiff; and Mr. *Dunning*, for the defendant.

For the plaintiff, it was insisted that he was not answerable for this event, which happened without his neglect or default; unless there had been some special undertaking.

Indeed, a tenant is bound to provide the landlord as good a house, in case of its being burnt, if he covenants to deliver up the house to him again, in as good repair as it was then: upon such a special undertaking an action would lie, but not otherwise. Doctor and Student, dialogue 2, chap. 4.

In the case of wagoners and common carriers, they are bound to answer for the goods against all events but acts of God and of the enemies of the king. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Amies v. Stephens*, 1 Str. 128. And a gaoler is excusable from escapes in those cases. 1 Ro. Abr. 808, pl. 5, 6. And in like manner, where it is the act of God, the person who has the custody of another man's property is excused.

The plaintiff here was a general bailee only, therefore not chargeable. 1 Inst. 89. He was only obliged to keep it as he would keep his own.

The case of *Coggs v. Bernard* in 2 Ld. Raym. 909, overrules Southcote's case in 4 Co. 84.

Even a pawn remains the property of the original owner. Sir John Hartopp *v. Hoare*, 2 Str. 1187. The plaintiff was considered as a mere bailee, for safe custody only.

In insurances made by merchants, it is usual to insert docks. The men were on board of this ship (though that makes no difference).

The plaintiff therefore was not answerable for this loss of the ship.

safe to the delivering port. Afterwards in another cause, the sittings after this term at Guildhall, between Chandler and Meade, in such an action, it appeared that the plaintiff was hired by the defendant at Carolina to serve on board the *Jane* sloop, whereof the defendant was master, from Carolina to England, at £3 per month; that he served two months, then the ship was took by a French privateer and ransomed; and just as she came off of Plymouth, the plaintiff was impressed, &c., and then the ship came safe into the river Thames, where she disposed of her cargo; and by Holt, the plaintiff can have no wages, the ship having been took by the enemy and ransomed. Mr. Raymond insisted that in such cases he should recover pro rata, and that the usage among merchants was so; which Holt said if he could prove, it would do; but wanting proof of it, the plaintiff was nonsuited."

As to the effect on an obligation, of the act of a foreign state, see *Paradine v. Jane* (1671) Aleyn, 26; *Hernaman v. Bawden* (1766) 3 Burr. 1844; *Pratt v. Cuff*, quoted by the court from a MSS. note in *Thompson v. Rowcroft* (1803) 4 East, 34, 43; *Bergstrom v. Mills* (1800) 3 Esp. N. P. 36; *Beale v. Thompson* (1804) 4 East, 546.—Ed.

And if the plaintiff be not liable for the loss of the ship, he is entitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays £5 for the hire of a dock, and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

When tithes are set out, they are thereby vested in the parson, and he may maintain trespass for any injury done to them.

The defendant might have sold this ship while it was in the dock, and these materials would have been part of it. The fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. Cowell in treating of the various modes of acquiring property, is of this opinion.

Mr. *Dunning*, contra, for the defendant.

The question is, "Whether the plaintiff is entitled to be paid by the defendant for that work and labor from which the defendant neither did nor could reap any advantage."

The plaintiff was obliged to redeliver the ship safe, having undertaken to repair it.

The defendant has had no benefit from the plaintiff's labor or materials; neither was the plaintiff's undertaking completely performed.

Carriers and hoy-men cannot be entitled to be paid for carrying things that perish before they are delivered; nor jewellers, for setting a jewel that is destroyed before it is set. So a tailor, where the cloth is destroyed before the suit is finished. So of any unfinished, incomplete undertaking.

As there is no express agreement to support this action, the court will not imply any.

Mr. *Murphy* in reply. As to the defendant's not having had the benefit of the repair. There is no reason why the shipwright should not be paid for his work and labor and materials. "Digest." title *de negotiis gestis*. The defendant might have insured his ship.

Nothing can be due to a carrier or hoy-man till the delivery of the goods at the destined place. But these materials were delivered, and the work and labor actually done.

Suppose a horse, sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected; shall not the farrier be paid for what he has already done?

A pawnbroker, if the pawn is destroyed by the act of God, shall recover the money lent.

LORD MANSFIELD. This is a desperate case for the defendant (though compassionate). I doubt it is very difficult for him to maintain his point. Besides it is stated, "That he paid £5 for the use of the dock."

MR. JUSTICE WILMOT. So that it is like a horse that a farrier was curing being burnt in the owner's own stable.

Mr. *Attorney-General* being retained to argue it for the defendant, The court offered to hear a second argument from him, if he thought he could maintain his case, but seemed to think it would be a very difficult matter to do it.

Mr. *Attorney-General* appeared to entertain very little hope of success: however, he desired a day or two to consider of it. But

Mr. *Recorder* now moving "That the *postea* might be delivered to the plaintiff,"—

The *Attorney-General* did not oppose it.

And a Rule was made accordingly,

That the *postea* be delivered to the plaintiff.¹

HAYNES, SPENCER & COMPANY, APPELLANTS v. SECOND BAPTIST CHURCH OF ST. LOUIS, RESPONDENT.

ST. LOUIS COURT OF APPEALS OF MISSOURI, 1882.

[12 *Missouri Appeal Reports*, 536.²]

BAKEWELL, J., delivered the opinion of the court.

This is an action by an incorporated company, to recover of defendant, which is a corporation, the value of certain pews and other wood-work of a church edifice, and labor and materials furnished by plaintiff to defendant. The cause was tried by the court, a jury being waived, and the finding and judgment were for the defendant.

There are record admissions and testimony tending to show the following state of facts: Defendant was erecting a house of worship in St. Louis. It let out the work to different contractors, having separate contracts with the mason, carpenter, and other mechanics. The general direction of the work was under the control of an architect and superintendent employed by defendant. Defendant kept the building insured, increasing the insurance from time to time as the building progressed, insuring far enough ahead to cover any work after it was

¹But if full performance or acceptance be an express condition precedent to payment, the English courts deny a recovery where the subject matter is destroyed without the fault of either party to the contract. *Appleby v. Myers* (1867) L. R. 2 C. P. 651. If, however, the defendant has rendered services and the subject matter is accidentally destroyed without either party being in fault, the plaintiff cannot recover any payments he may have made. *Anglo-Egyptian Navigation Co. v. Rennie* (1875) L. R. 10 C. P. 271. That is to say, the loss is left where it falls.

See *Butterfield v. Bryan* (1891) 153 Mass. 517, *post*, where the subject is discussed and the authorities collected.—Ed.

²Affirmed on appeal in 88 Mo. 285.—Ed.

done. On January 2, 1879, the building caught fire from some unexplained accident. The answer alleges that this was without the fault or negligence of defendant, and the reply denies this, though it admits that the fire was accidental. The fire destroyed the church and everything in it.

The written contract between plaintiff and defendant provides that plaintiff shall make, finish, and put up complete, furnishing all labor and materials, the pews in the audience-room and in the gallery, the pulpit, and the screen over the pulpit and baptistry, and the organ front: the work to be of a described character and quality, and subject to the approval of the architect of defendant; for the sum of \$4,800, to be paid on the completion and acceptance of the work. The work is to be put up complete, on or before December 1, 1873, under a forfeit of \$10 a day for every day's delay beyond that time.

At the time of the fire, defendant was engaged in putting up the pews. The gallery pews were partly up; none of the pews in the audience-room were up, but they were scattered about on the floor; two pieces of the organ loft were in the building, but not put up. The baptistry-screen was partly up, and all of it was in the building. It would have taken five men about two weeks to set in order in the church what remained of plaintiff's contract. While the pews were being put up, some slight change from the contract was made in the construction of some pews, at the suggestion of the building committee of defendant; this change was nearly completed when the fire broke out. The work and materials furnished were of the character and quality required by the contract, and reasonably worth the amounts charged in the bill of particulars filed with the petition. Some payments had been made, and the balance claimed remains unpaid.

If money is to be paid when the work is done, non-performance of the work is a good defence; and where there has been a partial performance only, and not a performance of what is substantial in the contract, as a general rule, plaintiff cannot recover. The rule always applies where the non-performance is voluntary on the plaintiff's part. But where the non-performance is caused by the defendant, or by the act of God, the rule is not always applied, and in this country (*Cutter v. Powell*, 6 Term Rep. 320), has not been followed, but, in contracts for service, sickness and death have been held to excuse the non-performance of an entire contract.

If a workman undertakes to build a house, to be paid when the house is done, he cannot demand payment until he has complied with his contract; and if the house is destroyed by inevitable accident, it will be the loss of the contractor. And so we held in *Richardson v. Shaw*, 1 Mo. App. 234, that, where the contract-price of the building is to be paid in instalments, on the completion of certain specified portions of the work, though if the house be destroyed by accident,

the employer would be bound to pay the instalments then due, yet he would not be responsible for the intermediate work and materials.¹

The case before us is not, however, an undertaking to build a house, but a contract to do certain wood-work in an erection under the control of defendant and not under the control of plaintiff. There is a difference. In the first case, the defendant makes no agreement as to the existence of the building; in the last case, the work contracted for cannot be done unless the building exists while it is being done and until it is completed, and it may be said that there is an implied agreement that the building shall be in existence as a condition precedent to doing the work upon it. It happens that contracts on their face appear to be obligatory on one party only, when it was manifestly the intention of the parties, and a part of the consideration, that there should be a correlative obligation on the other party. And "if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract, will be necessarily implied." Per HUGH, J., in *Lewis v. Insurance Co.*, 61 Mo. 538.

It is a maxim that *res perit domino suo*; and the rule of the common law is the civil-law rule, that if one is employed in making up the materials or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated. And upon grounds applicable to the general contract of hire, in the absence of any special agreement or general usage, if the thing for which materials were furnished is destroyed before the work is done, the employer must pay for the work and materials, though they are lost to him. *Menetone v. Athawes*, 3 Burr. 1592. But Story lays down the doctrine that where there is a contract to do work on a thing by the job, and the thing accidentally perishes, the workman would not be entitled to compensation *pro tanto* up to the time of the destruction, because the job must be treated as an entirety and be completed before the compensation under the agreement would be due. And *Appleby v. Myers* and *Brumby v. Smith*, which will be considered afterwards, are referred to in the notes to the later editions. Story on Bail, (9th ed.), sect. 426 *a*, *et seq.* He admits, however, that Pothier holds a different opinion, and thinks that, even then, the workman should recover *pro tanto*. But the observations of Story go only to some of the general principles applicable to the present case, and he does not consider the case in which the *res* is in the custody and control of the owner, and in which the contract implies that it shall remain in existence to receive the work.

Brumby v. Smith, 3 Ala. 123, was decided in 1841, and is directly

¹See, *Guillon v. Tondy* (1878) 5 W. N. C. (Pa.) 528; *Siegel v. Eaton & Prince Co.* (1897) 165 Ill. 550.—Ed.

in point for respondent. A workman agreed to complete the carpenter-work on a house, and to receive a certain sum on the completion of the work, his employer furnishing the materials. The house and materials were destroyed by fire, without the fault of the workman, the house being in the possession of the employer. It is held that the workman could not recover a *pro rata* compensation. The case is put solely upon the ground that, by the express terms of the contract, the labor was not to be paid for until the work was completed, and that, whenever this is rendered impossible without the act of the employer, there can be no recovery.

But principles applicable to the case at bar seem to have been much more carefully considered and applied in the case of *Appleby v. Myers*, 1 L. R. C. P. 614, decided in 1866. In that case, plaintiffs contracted with defendant to erect, upon premises in defendant's possession, a steam engine and machinery, the work being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable proportion of the materials for that purpose was upon the building, when the whole premises, with the machinery and materials, were destroyed by an accidental fire. It was held unanimously by the judges of the common pleas, that plaintiffs were not entitled to recover the whole contract-price; but that, inasmuch as the machinery was to be fixed to defendant's premises so that the parts of it when, and as, fixed, would become his property and be subject to his dominion, and the contract must be taken to involve an implied promise on the defendant's part to keep up the building, they were entitled to be paid as upon an implied contract, the value of the work and materials actually done and supplied by them under the agreement. The court says that the contract falls within a qualification of the principle that, where there is a positive contract to do a thing in itself not unlawful, the contractor must perform it or pay damages. The qualification is this: That, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused by the perishing of the thing before the breach. As the machinery was to be so affixed to the building, that part of it would become defendant's property and subject to his dominion, it is held that there is an implied term that defendants shall provide the buildings and keep them in a fit state. No decision directly in point was cited to the court. But counsel referred to *Story on Bailments*, each relying on passages in his favor.

On appeal, in the Exchequer Chamber (2 L. R. C. P. 650), the judgment was reversed. On the argument, the Alabama case (*Brum-*

by *v. Smith, supra*) was cited. The court did not agree with the court below in thinking that there was an absolute promise that the premises should continue fit to receive the work; and held that, as the premises were destroyed without fault on either side, the misfortune excused both parties from further performance of the contract, but gave a cause of action to neither; and said that, even on the supposition that the materials had become unalterably fixed to the defendant's premises, that the plaintiff, in their opinion, could recover nothing under such a contract as the one before them, unless the work was completed.

Niblo v. Binsse, 1 Keyes, 477, was decided in 1864, in New York, reversing the supreme court. The premises were destroyed by an accidental fire, without any fault of plaintiff or defendant. Plaintiff undertook to put in steam-pipes and heaters at a price stipulated to be paid, and was working on the job when the fire occurred. It was held that, where the owner of the property retains possession, there is an implied obligation for him to have the premises ready for the labor to be performed upon them, and that the destruction of the premises put the defendant in default, and that plaintiff was entitled to recover for the work performed up to the time of the fire. In this case, the history of the litigation is just the reverse of that in *Appleby v. Myers*. The referee and the supreme court found for defendant (44 Barb. 54), holding that accidental fire is not to be called the act of God in such a sense as to excuse from the performance of a contract. The court held that the impossibility which excuses must arise without human intervention. In this ground, the supreme court differs from the English judges, who all held that the fire occurring without plaintiff's fault excused him from performing the contract, and relieved him from all liability for its non-performance.

In a very recent case in Wisconsin (*Cook v. McCabe*, 53 Wis. 250), it was held that, where there was not an absolute and indivisible contract to build a complete house for a specific sum, but only a contract to do a part of the work and furnish a part of the materials, the remainder to be otherwise provided for from time to time by the landowner, though the price was a fixed aggregate sum, and no payment was to be made until the house was completed, and the part built was destroyed by fire before the completion of the whole, the contractor might recover for work and materials done and furnished by him, especially where the owner of the land treated the house as his own by procuring insurance and receiving the insurance-money.

In Illinois, while it is held (*Schwartz v. Saunders*, 46 Ill. 18), that, where one undertakes under a contract to do a thing not of itself impossible, he must do it before he can reap any advantage of the contract, it is nevertheless held (*Rawson v. Clark*, 70 Ill. 656) that, where one, under a contract with the owner of a building to put into it certain iron-work, had completed the work, except putting it into the

house, and the house was in course of erection, and was not ready to receive the iron-work when it was completed, and the building was burned before the iron could be put in, the workman was entitled to recover, as he was not in default and the defendants were bound to provide a building to receive the iron-work, and they, and not plaintiff, are to be held to have assumed the risk of a destruction of the building by fire.

And in Massachusetts (Lord v. Wheeler, 1 Gray, 282), it was held that a workman who had contracted to repair a house for a certain sum, and who had nearly completed the repairs when the house was destroyed by an accidental fire, was excused from the completion of his contract and entitled to recover for the repairs due. But this case is expressly put upon the ground that when the repairs were substantially done, the defendant entered and occupied, and that such use and employment was a severance of the contract and an acceptance *pro tanto*.

In Texas they do not follow Appleby v. Myers, but hold, in accordance with the established doctrine of that state as to the apportionability of contracts, that, where one has undertaken to furnish materials and do the wood-work to finish defendant's brick dwelling and to turn over the building complete by a certain day, for the specified gross sum, if the building is destroyed without plaintiff's fault, by fire, while his work is unfinished, he may recover for the work and materials furnished.

The weight of authority in America certainly authorizes the conclusion that, on the facts of this case as we have stated them, plaintiff was entitled to recover. And we think that reason as well as authority preponderates in favor of this view. Plaintiff had not control of the building, and defendant had; plaintiff had no authority over his co-contractors and their employees, nor the right to exclude anybody from the building who might be there by the permission of the building committee. He could not take steps to guard against fire, as might be done by those having control of the building. The fire happened by human agency, and not from any irresistible *vis major*. It is not pretended that the house was struck by lightning; and, in stipulating that this wood-work should be completed, it must have been understood by plaintiff, as it must also have been understood by defendant, that this was upon the implied condition that the building should stand until the expiration of the time accorded to plaintiff within which he was to complete his work. Where the owner of the property retains possession and contracts for work to be done upon it while in his custody, there is, we think, an implied obligation resting upon him to have it in readiness for the work to be performed upon it, and the plaintiff was not bound to provide in the contract for the default of the other party in the matter of this obligation. So far as regards an impossibility arising from the act of God, neither party need pro-

vide against that in his contract; but from an impossibility arising from human agency, and an accidental fire making it impossible to finish the building in time to receive the wood-work, it would seem that the owner and occupier of the building, rather than one having access to it as one of many contractors employed in its repair or construction, should provide.¹

The instructions need not be set out or commented upon. We think that the court erred in giving a declaration of law to the effect that, upon the pleadings and evidence, plaintiff is not entitled to recover. Other instructions were given which cannot be reconciled with the views expressed in this opinion.

Our attention is called to the statutory provision that no "suit shall be maintained against any tenant or other person in whose house or apartment fire shall accidentally take place; nor shall any recompense be made by any such person for any damages occasioned thereby." Rev. Stats., sect. 667. This section was not intended to have any application to a case such as that before us. Plaintiff does not seek to recover for damages done to him by the fire, but seeks to recover the value of his work, labor, and materials furnished to defendants, notwithstanding their destruction.

The judgment is reversed and remanded. All the judges concur.

In *Young v. City of Chicopee* (1904) 186 Mass. 518, HAMMOND, J., delivered the opinion of the court as follows: This is an action to recover for work and materials furnished under a written contract, providing for the repair of a wooden bridge forming a part of the highway across the Connecticut River. While the work was in progress the bridge was totally destroyed by fire without the fault of either party, so that the contract could not be performed.

The specifications required that the timber and other wood-work of the carriage way, wherever decayed, should be replaced by sound material securely fastened, so that the way should be in a "complete and substantial condition." As full compensation both for work and materials the plaintiff was to receive a certain sum per thousand feet for the lumber used "on measurements made after laying and certified by both engineers," or, in other words, the amount of the plaintiff's compensation was measured by the number of feet of new material wrought into the bridge. That the public travel might not be inter-

¹See, *Cook v. McCabe* (1881) 53 Wis. 250; *Cleury v. Schier* (1876) 120 Mass. 210; *Rawson v. Clark* (1873) 70 Ill. 656; *Haysell v. Sterling Coal Co.* (1899) 46 W. Va. 158. And so a pro rata recovery has been permitted where the contract was not performed owing to the impossibility of detecting latent defects in the materials furnished. *Gove & Co. v. Island City Mercantile Co.* (1890) 19 Oregon, 363; or where, on a sale, delivery became impossible owing to the destruction of the subject matter, *Murray v. Richards* (1828) 1 Wend. 58.—Ed.

ferred with more than was reasonably necessary, the contract provided that no work should be begun until material for at least one half of the repairs contemplated should be "upon the job." With this condition the plaintiff complied, the lumber, which at the time of the fire had not been used, being distributed "all along the bridge" and upon the river banks. Some of this lumber was destroyed by the fire.

At the trial the defendant did not dispute its liability to pay for the work done upon and materials wrought into the structure at the time of the fire; (*Angus v. Scully*, 176 Mass. 357, and cases there cited;) and the only question before us is whether it was liable for the damage to the lumber which was distributed as above stated and had not been used.

It is to be noted that there had been no delivery of this lumber to the defendant. It was brought "upon the job" and kept there as the lumber of the plaintiff. The title to it was in him and not in the defendant. Nor did the defendant have any care or control over it. No part of it belonged to the defendant until wrought into the bridge. The plaintiff could have exchanged it for other lumber. If at any time during the progress of the work before the fire the plaintiff had refused to proceed, the defendant against his consent could not lawfully have used it. Indeed had it not been destroyed it would have remained the property of the plaintiff after the fire. Nor is the situation changed, so far as respects the question before us, by the fact that the lumber was brought there in compliance with the condition relating to the commencement of the work. This condition manifestly was inserted to insure the rapid progress of the work, and it has no material bearing upon the rights of the parties in relation to the lumber. It is also to be borne in mind in this connection that the compensation for the whole job was to be determined by the amount of lumber wrought into the bridge.

The contract was entire. By the destruction of the bridge each party was excused from further performance and the plaintiff could recover for partial performance. The principle upon which the plaintiff can do this is sometimes said to rest upon the doctrine that there is an implied contract upon the owner of the structure upon which the work is to be done that it shall continue to exist, and therefore, if it is destroyed, even without his fault, still he must be regarded as in default and so liable to pay for what has been done. *Niblo v. Binsse*, 1 Keyes, 476. *Whelan v. Ansonia Clock Co.* 97 N. Y. 293. In *Butterfield v. Byron*, 153 Mass. 517, 523, it was said by KNOWLTON, J. that there was "an implied assumpsit for what has properly been done by either [of the parties], the law dealing with it as done at the request of the other, and creating a liability to pay for it its value." In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the

structure, had become so far identified with it as that but for the destruction it would have enured to him as contemplated by the contract.

In the present case the defendant, in accordance with this doctrine, should be held liable for the labor and materials actually wrought into the bridge. To that extent it insured the plaintiff. But it did not insure the plaintiff against the loss of lumber owned by him at the time of the fire, which had not then come into such relations with the bridge as, but for the fire, to enure to the benefit of the defendant as contemplated by the contract. The cases of *Haynes v. Second Baptist Church*, 88 Mo. 285, and *Rawson v. Clark*, 70 Ill. 656, cited by the plaintiff, seem to us to be distinguishable from this case.

The exceptions therefore must be sustained and the verdict set aside. In accordance with the terms of the statement contained in the bill of exceptions; judgment should be entered for the plaintiff in the sum of \$584 damages, and it is

So ordered.

BUTTERFIELD v. BYRON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1891.

[153 *Massachusetts*, 517.]

CONTRACT brought in the name of the plaintiff for the benefit of certain insurance companies, for breach of a building contract entered into between the plaintiff and the defendant. At the trial in the Superior Court, before BARKER, J., there was evidence tending to show the following facts:¹

A builder and a landowner entered into a contract, by which the former was to "make, erect, build, and finish" a hotel upon the land, and the latter was to do the grading, excavating, stonework, brickwork, painting, and plumbing, and pay a certain sum as follows: each month seventy-five per cent. of the value of the work of the preceding month, the balance in thirty days after completion. The building was destroyed by lightning shortly before completion.

At the trial, the plaintiff contended that he was entitled to recover in his action (1) the whole of the sum of \$6,914.08 [\$5,652.30 for advances made to the defendant, and \$1,261.78 for work done and materials by the plaintiff in laying the foundation], (2) \$38 for certain shingles and window weights that had been saved from the fire and carried away by the defendant, and (3) the amount forfeited under the contract at the rate of \$15 a day from June 10, 1889, to the date of the writ.

Upon these facts the judge directed a verdict for the defendant,

¹The statement of facts is shortened and modified.—ED.

and reported the case for the determination of this court, such order to be made as the court might direct.

The case was argued at the bar in September, 1890, and afterwards, in February, 1891, was submitted on the briefs to all the judges.

G. D. Robinson, for the plaintiff.

G. M. Stearns (*W. B. Stone* with him), for the defendant.

KNOWLTON, J. It is well established law, that, where one contracts to furnish labor and materials, and construct a chattel or build a house on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it. *Adams v. Nichols*, 19 Pick. 275; *Wells v. Calnan*, 107 Mass. 514; *Dermott v. Jones*, 2 Wall. 1; *School Trustees of Trenton v. Bennett*, 3 Dutcher, 513; *Tompkins v. Dudley*, 25 N. Y. 272. It is equally well settled, that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. *Taylor v. Caldwell*, 3 B. & S. 826; *Lord v. Wheeler*, 1 Gray, 282; *Gilbert & Barker Manuf. Co. v. Butler*, 146 Mass. 82; *Eliot National Bank v. Beal*, 141 Mass. 566, and cases there cited; *Dexter v. Norton*, 47 N. Y. 62; *Walker v. Tucker*, 70 Ill. 527. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, What is the true interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest, as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials there-

for. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. *Howell v. Coupland*, 1 Q. B. D. 258.

It seems very clear that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered, "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not bound to build another, or to do anything further under his contract.¹ If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was on an implied condition that

¹But see, *Chapman v. Beltz Co.* (1900) 48 W. Va. 1. See, also, *Weis v. Devlin* (1887) 67 Tex. 507.—Ed.

the building should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of. The case of *Cook v. McCabe*, 53 Wis. 250, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. *Clark v. Franklin*, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute upon the authorities. The decisions in England differ from those of Massachusetts, and of most of the other States of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. *Allison v. Bristol Ins. Co.*, 1 App. Cas. 209, 226; *Byrne v. Schiller*, L. R. 6 Ex. 319. In the United States and in Continental Europe the rule is different. *Griggs v. Austin*, 3 Pick. 20, 22; *Brown v. Harris*, 2 Gray. 359. In England it is held that one who has partly performed a contract on property of another which is destroyed without the fault of either party, can recover nothing; and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. *Appleby v. Myers*, L. R. 2 C. P. 651; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271.¹ One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. *Whineup v. Hughes*, L. R. 6 C. P. 78. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any instalments which were due on it before his death. *Stubbs v. Holywell Railway*, L. R. 2 Ex. 311.

In this country, where one is to make repairs on a house of another

¹See also, *Brumby v. Smith* (1841) 3 Ala. 123; *Clark v. Collier* (1893) 100 Cal. 256; *Siegel v. Eaton & Prince Co.* (1897) 165 Ill. 550; *Huyett Mfg. Co. v. Chicago Edison Co.* (1897) 167 Ill. 233; *Fairbanks v. Richardson Drug Co.* (1890) 42 Mo. App. 262; *Pike Electric Co. v. Richardson Drug Co.* (1890) 42 Mo. App. 272; *Murphy v. Forget* (1901) 1 Rap. Jud. Quebec, 19 C. S. 135.—Ed.

under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In *Cleary v. Sohler*, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See also *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517. In *Cook v. McCabe*, *ubi supra*, the plaintiff recovered *pro rata* under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In *Hollis v. Chapman*, 36 Texas, 1, and in *Clark v. Franklin*, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; and *Clark v. Busse*, 82 Ill. 515. The same principle is applied to different facts in *Jones v. Judd*, 4 Comst. 411, and in *Hargrave v. Conroy*, 4 C. E. Green, 281. If the owner in such a case has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be, that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable.¹ Where there is a bilateral contract for an entire consideration moving each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that

¹Accord: *Angus v. Scully* (1900) 176 Mass. 357; *Haynes v. Second Baptist Church* (1885) 88 Mo. 285 [compare *Fairbanks v. Richardson Drug Co.* (1890) 42 Mo. App. 262; *Pike Electric Co. v. Richardson Drug Co.* (1890) 42 Mo. App. 272]; *Niblo v. Binsse* (1864) 1 Keyes, 476; *Whelan v. Ansonia Clock Co.* (1884) 97 N. Y. 293; *Dohm v. Rogers* (1896) 149 N. Y. 489, 494; *Hayes v. Gross* (1896) 9 App. Div. (N. Y.) 12 (an excellent case affirmed upon the opinion of LONDON, J., below, 162 N. Y. 610); *Weis v. Devlin* (1887) 67 Tex. 507.

See also, *Bentley v. State* (1889) 73 Wis. 416.—Ed.

a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements on account of a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy available in this suit is by a declaration in set-off. If, on the other hand, each instalment due was a separate consideration for the payment made at the time, then as to those instalments and the payments of them the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid.

We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The \$38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins.

According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the Superior Court deems reasonable.

Verdict set aside.

(b) *The Contract is Illegal.*

(1) *The Facts upon which the Illegality Depends are Unknown to one Party.*

MUSSON v. FALES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1820.

[16 *Massachusetts*, 332.]

ASSUMPSIT to recover the amount of sundry disbursements and expenses on the brig *Julian*, of which the defendants were owners. Trial on the general issue before the Chief Justice.

The plaintiffs were merchants in the island of *Bermudas*, within the dominions, and subjects of the king, of *Great Britain*. The defendants were citizens of the *United States*. The brig *Julian* was provided with papers, to give to her the appearance of *Spanish* property, and was under the care of *Eustace Malony*, who professed himself a *Spanish* subject. The vessel having left the *United States* in June, 1813, in her return from *Porto Rico* to the *United States* arrived at *Bermudas* on the 25th of December following; at which time war existed between these states and *Great Britain*. The brig needed repairs, having been much injured by winds and weather.

Capt. *Malony* applied to the plaintiffs to assist him; and, without disclosing the real character of the vessel, or that any persons were concerned with him in the voyage, procured the plaintiffs to pay and advance to him the several sums, charged in the account of disbursements and repairs. After she was refitted and ready for sea, she was seized by the marshal of the vice-admiralty court, libelled and condemned as enemy's property. The plaintiffs, at the request of *Malony*, aided him in defending against the libel, and paid the several bills charged in their account, touching the proceedings in the vice-admiralty court.

An appeal was claimed by the plaintiffs at the request of *Malony*, and they gave bonds to prosecute the appeal. They caused the appeal to be prosecuted in *England*; where the decree of the court of vice-admiralty was affirmed; and they had paid, or were liable to pay, the sums charged by them, as expenses of prosecuting the appeal.

It appeared in evidence, that the defendants knew of the pendency of the appeal, and did not disapprove of the same. No express promise was shown. The verdict was for the plaintiffs: and if, in the opinion of the court, they were entitled to recover, auditors were to be appointed by the court, and the verdict was to be conformed to their report as to the amount of damages; and judgment accordingly: otherwise the plaintiffs were to become nonsuit.

Thatcher and *Webster*, for the defendants, contended that all vol-

untary trading or even intercourse between the citizens of two nations at war was wholly unlawful, and no contract arising thereon could ever be enforced. Indeed parties so situated are wholly incapable of contracting. No civil relation exists between them. Certain species of contracts, which arise from the state of war itself, are alone excepted; as capitulations, cartels, exchange of prisoners, ransoms, &c. *Holman v. Johnson*, Cowp. 343; 3 B & P. 35; 8 Cranch. 155; 7 Taunt. 489; 15 Johns. 57; 3 Merivale, 469; Edw. Adm. Rep. 327; Doug. 650; Vattel B. 2, c. 5; 7 St. Trials, 493; 13 Ves. jun. 71.

W. Sullivan and Mason for the plaintiffs.

PARKER, C. J., delivered the opinion of the court. This case is different, in some of its aspects, from all which have been cited, and from any which we have been able to find.

It seems to be the settled law, that all trading between the subjects of nations at war is unlawful; and that all contracts growing out of such trading, or out of any voluntary intercourse with a publick enemy, are void. Such trading and intercourse are considered criminal in both parties; and no action can be maintained, the basis of which is an unlawful act of the party bringing the action.

But the case before us is of a different complexion. The plaintiffs must be taken to have been ignorant of the national character of the vessel they were supplying, and to have dealt upon the faith that they were trading with a neutral, in the due and regular course of business; and this even after the vessel was seized. For supposing them to believe she was *bonâ fide* a Spanish vessel, it was not unlawful, but on the contrary laudable for them to endeavour to procure her release. It is the common duty of factors and agents in a foreign country, to labour in the defence of property committed to their care, when charged with a violation of the laws of their country; and it is only when they are assisting to evade those laws, knowing of an intent to evade them in their principals, that they become amenable as unfaithful subjects. In the cases which commonly occur, of trading or making contracts with the enemy, the parties are generally *in pari delicto*; and neither can maintain an action against the other.

When a case arises, which shews the offence to be all on one side, it would seem not only contrary to justice, but to the very doctrine upon which the general policy is founded, to allow the criminal debtor to go free, to the loss of the innocent and ignorant creditor: for this would be to punish the innocent for the benefit of the guilty. If in time of war, an enemy should come into this country in disguise, and, claiming to be an *American* citizen, should obtain property upon credit; shall he, when sued, assent his own character, and successfully resist the suit upon the ground that he had traded with the enemy?—If this be the law of nations, or of war, it would seem that all moral principle was to give way before the stern and relentless genius of war.

But we apprehend it is not so. There must be an analogy between the principles, which regulate contracts arising in a state of war, and those which are made in a time of peace. When a man would avoid his contract, as contrary to the provisions of municipal law, it must appear that the party prosecuting was in fault, as well as himself. Thus in the case of usury, and of gaming, both parties are equally in fault; and either may successfully resist the other, in a court of justice. But no instance can be produced from the books, where a man has been permitted to avow his own breach of law, in order to avoid his contract; where there has been a valuable consideration paid by the other party, who is entirely free from any criminal intent: unless such contract be rendered utterly void by statute. Indeed it is difficult to conceive of a case, arising under the municipal law, in which the unlawfulness, if any exist, is not mutual.

But the case before us has such an aspect, one party alone being guilty. The defendants' vessel went into an enemy's port in the guise of a friend; whether forced in or not makes no difference. The defendants' agent, pretending to be the subject of a neutral power, solicited assistance from the plaintiffs. How could these latter have committed an offence, in affording it? If prosecuted by their own government, they could have defended themselves, by shewing their ignorance of the fact. What would constitute a defence in such prosecution, ought to be sufficient to repel the defendants' answer to their demand.

It is said however that, being enemies, they are incapable of contracting; that they never stood in the relation of debtor and creditor. But this is *petitio principii*. Goods sold, and services performed, are the foundation of contracts. A contract may be avoided, if unlawful. But it is not unlawful if the party claiming be in no fault: and he cannot be in fault, if he be ignorant of the facts which constitute the unlawfulness.

From this reasoning it follows that the plaintiffs are entitled to judgment on the verdict rendered in their favour: and auditors must be appointed, who are to report the sum, for which judgment is to be rendered.¹

¹Accord: *Oom v. Bruce* (1810) 12 East, 225; *Burekholder v. Beetem's Administrators* (1870) 65 Penn. St. 496; *Bloxsome v. Williams* (1824) 3 B. & C. 232; *Hentig v. Staniforth* (1816) 5 M. & S. 122.—Ed.

(2) *The Facts upon which the Illegality Depends are Known to Both Parties.*

TAPPENDEN v. RANDALL.

COMMON PLEAS, 1801.

[2 *Bosanquet and Puller*, 467.]

THIS cause came on to be tried before Lord ALVANLEY, Ch. J., at the second Sittings in this Term, when a verdict was found for the Plaintiffs, damages £216, costs £10, subject to the opinion of the Court on the following case.

The declaration stated, that the Defendant, before the bankruptcy of *Bray*, was indebted to *Bray* in £300, for money lent, and £300 for money paid, and that he was indebted to the Plaintiffs after the bankruptcy in £300 as well for money before *Bray* became a bankrupt received to *Bray's* use, as for money after the bankruptcy received to the use of the assignees, and upon an account stated with the Plaintiffs as assignees.

Bray duly became a bankrupt, and the commission was issued against him, under which the Plaintiffs were declared his assignees. On the 12th of *November*, 1800, previous to any act of bankruptcy, in consideration of £210 then paid by *Bray* to the Defendant the Defendant entered into a bond in the penal sum of £999 with a condition as follows: "Whereas the said *William Randall* hath, in consideration of two hundred and ten pounds to him paid by the said *John Bray*, at the time of the sealing and delivery of the above written bond or obligation, contracted and agreed to pay unto the said *John Bray* or his assigns, on the first day of *May* in every year, one annuity or clear yearly sum of one hundred and five pounds until he the said *William Randall*, his heirs, executors, or administrators can prove by evidence, or otherwise, to abide by the report of three eminent hop merchants who shall make it appear to the satisfaction of the said *John Bray*, his executors, administrators, and assigns, that the revenue received by Government by reason of the duties now assessed by parliament upon hops grown in *Great Britain*, shall in the present or any one year hereafter, amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at present imposed by parliament, and not to be affected by any subsequent alteration whatever: and for securing the due payment of the said annuity of one hundred and five pounds until such event, the said *William Randall* hath entered into the above written bond or obligation: Now, therefore, the condition of the above written bond or obligation is such, that if the said

William Randall, his heirs, executors, administrators, or assigns, shall and do from the date of the above bond well and truly pay, or cause to be paid unto the said *John Bray*, or his assigns, one annuity or clear yearly sum of one hundred and five pounds of lawful money of *Great Britain*, on the first day of *May* in each and every year, without any deduction or abatement whatsoever, until the said *William Randall*, his heirs, executors, or administrators shall prove by evidence, or otherwise abide by the report of three eminent hop merchants, who shall make it appear to the satisfaction of the said *John Bray* or his assigns, that the revenue received by Government by reason of the duties now assessed by Parliament upon hops, shall, in the present or any one year hereafter, amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at the present time imposed by Parliament, and not to be affected by any subsequent alteration therein, and shall and do make the first payment of the said annuity of one hundred and five pounds on the first day of *May* in the year of our Lord 1802, then and in such case or cases the above written bond or obligation shall be void and of none effect, otherwise it shall be and remain in full force and virtue.

“*William Randall* (Seal). ”

“Sealed and delivered (being first
legally stamped, and several
obliterations and interlineations
being made) in presence of

“*John Broad*.

“*Wm. Mann*.

<p>“Received at the time of the sealing and delivery of the within written bond or obligation of and from the within named <i>John Bray</i> the sum of two hundred and ten pounds (being the consideration paid for the annuity within secured) by me. Signed in the presence of <i>John Broad</i>, <i>Wm. Mann</i>.</p>	}	£210.
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“*Wm. Randall*.”

Before the bringing of this action the Plaintiffs applied to the Defendant, stating that they considered the bond to be illegal, and demanding the return of the £210 and interest, which was refused.

If the Court should be of opinion, that the Plaintiffs were entitled to recover back the said sum of £210 with interest thereon, then the verdict to stand. If the Court should be of opinion, that the Plaintiffs were entitled to recover back the said sum of £210 but were not entitled to interest thereon, then the verdict to be entered for £210 damages and 40s. costs. If the Court should be of opinion, that the Plaintiffs were entitled to recover nothing, a nonsuit to be entered.

HEATH, J. I am of the same opinion. It seems to me, that the distinction adopted by Mr. Justice BULLER between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction.¹ Undoubtedly, there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it: as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs, I think there ought to be a *locus penitentiae*, and that a party should not be compelled against his will to adhere to the contract.

ROOKE, J. This is an action brought by assignees to recover back money paid by way of consideration for a bond which clearly could not be put in force, and I think this action may well be supported. There is nothing criminal in the contract which was entered into between these parties; nor has that contract been executed; nor indeed, is this a case where money which has been paid over by a stakeholder is sought to be recovered. I therefore see no reason to prevent the present Plaintiffs from recovering: and I wish it to be understood, that I fully accede to the doctrine laid down by Mr. Justice BULLER respecting contracts executory and executed. If, in this case, any money had been paid upon the bond, I should have felt great difficulty respecting the right of the Plaintiffs to recover.²

Postea to the Plaintiffs.³

¹"There is a sound distinction between contracts executed and executory, and if an action is brought to rescind a contract, you must do it while the contract continues executory, and then it can only be done in the terms of restoring the other party to his original situation." Per BULLER, J., in *Lowry v. Bourdieu* (1780) Douglass, 468, p. 471.—ED.

²Opinions of ALVANLEY, C. J., and CHAMBER, J., omitted.

³Accord: *Aubert v. Walsh* (1810) 3 Taunton, 277; *Bank v. Wallace* (1881) 61 N. H. 24 (*semble*); *McCutecheon v. Merz Capsule Co.* (1896) 71 Fed. 787; *Spring Co. v. Knowlton* (1880) 103 U. S. 49; *Wright v. Stewart* (1904) 130 Fed. 905.

"The law encourages a repudiation of an illegal contract and allows a *locus penitentiae* to the guilty party as long as it remains an executory contract and the illegal purpose is not put into execution. *Bernard v. Taylor* (1893) 23 Ore. 416. It has been held otherwise after the *delictum* has been consummated. *Abbe v. Marr* (1859) 14 Cal. 210; *Anonymous* (1889) 10 Ohio Dec. 649. There is a decided tendency among courts and text-writers to distinguish between degrees of guilt in such cases on the theory that the deliberate swindler should not be able to protect himself by the legal maxim, 'In pari delicto potior est conditio possidentis.' *Pomeroy, Equity II*, sec. 942; *Smith v. Blachley* (1898) 188 Pa. St. 550; *Timmerman v. Bidwell*, 62 Mich. 205." 4 Col. Law Rev. 604.

So under "the statute 13 Eliz. c. 5 against fraudulent conveyances . . . such a conveyance is valid as between the parties. *Proseus v. McIntyre* (1849) 5 Barb. 424, [and] the courts generally will not entertain a suit to put the

THE HIGHWAYMAN'S CASE.

EXCHEQUER, 1725.

[2 *Evans' Pothier on Obligations*, 3, n. 1.¹]

THE bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, or ale houses, or at markets, or fairs.

"And your orator, and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow-Heath, when they dealt with a gentleman for a gold watch, and afterwards the said Joseph Williams told your orator that Finchley, in the County of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went, and met with the said gentleman, and after some small discourse they dealt for the said horse, &c.; that your orator and the said Joseph Williams continued their joint dealing together until Michaelmas, and dealt together in several places, *viz.*, at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere to the amount of £2,000 and upwards."

The rest of the bill is in the ordinary form for a partnership account. 3d October, 1725, on the motion of Sergeant *Girdler*, the

grantee in possession, *Southern Ex. Co. v. Duffey* (1873) 48 Ga. 358; *Kirkpatrick v. Clark* (1890) 132 Ill. 342, for that would be executing the illegality. *Mediaris v. Granberry* (Tex. 1905) 84 S. W. 1070; *Harrison v. Thatcher* (1872) 44 Ga. 638. However, [equity will grant a reconveyance] if (1) the grantor asks it in the interest of his creditors, *Carll v. Emery* (1888) 148 Mass. 32; [*Taylor v. Bowers* (1876) 12 B. Div. 291]; or if (2) he conveyed under duress, *Adderson's Adm'r's v. Meredith* (1885) 82 Ky. 565; *Austin v. Winston* (Va. 1806) 1 H. & M. 32, 3 Am. Dec. 583; *Bump, Fraudulent Conveyances*, 2d ed. 442." 5 Col. Law. Rev. 473.—Ed.

¹This case, under the name of *Everett v. Williams*, was originally reported in *European Magazine* for May, 1787, vol. 1, 360.—Ed.

bill referred for scandal and impertinence. 29th November, report of the bill as scandalous and impertinent confirmed; and order to attach White and Wreathcock, the solicitors. 6th December. The solicitors brought into court and fined £50 each; and ordered that Jonathan Collins, Esq., the counsel who signed the bill, should pay the costs. The plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735. Wreathcock, the solicitor, was convicted of robbing Dr. Lancaster in 1735, but reprieved and transported.¹

WEBB v. FULCHIRE.

SUPREME COURT OF NORTH CAROLINA, 1843.

[3 *Iredell's Law*, 485.]

THIS was an action of assumpsit, brought by the plaintiff to recover the sum of forty dollars. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following facts. The defendant had three acorn cups and a white ball, which he placed under one of the cups in the presence of the plaintiff. The defendant proposed to bet the plaintiff twenty dollars, that he could not tell which one of the three cups the ball was under. The plaintiff bet him that he could, and thereupon staked twenty dollars. The plaintiff pointed to the cup, and bet that the ball was under that one. The defendant raised the cup and the ball was not there. The money staked was then paid over to the defendant as being won by him. In the same way the defendant won twenty dollars more, which was in like manner paid over to him. The court was of opinion that the plaintiff could not maintain this action, and set aside the verdict and entered a nonsuit. From this judgment the plaintiff appealed.

RUFFIN, C. J. It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly, or to recover

¹In *Ridler v. Moore* (1797) Clifford's Southwark Election Cases, 371. KENYON, C. J., is reported to have said: "He had heard of a bill filed in the Court of Chancery, to obtain an account of the profits of a partnership trade carried on at Hounslow, but when it appeared that the trade was taking the purses of those who travelled over the heath, the Court would not endure it."

In a still earlier case, (before LORD MANSFIELD) *Faikney v. Reynons* (1767) 4 Burr. 2069, 2071, the principal case was cited as an authority by counsel.

The case was long regarded as a jest or hoax of some equity draftsman, but a careful examination of the original records by Sir Frederick Pollock has established its genuineness. As Sir Frederick exclaims: "Truth is stranger than fiction!" See 9 *Law Quarterly Review*, 105, 197-199.—Ed.

back money paid on it after its execution. Nor is it doubted, that money, fairly lost at play at a forbidden game and paid, cannot be recovered back in an action for money had and received. But it is perfectly certain, that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not won in the view of the law, and, therefore, the money is paid without consideration and by mistake, and may be recovered back. That, we think, was plainly this case. The bet was, that the plaintiff could not tell, which of the three cups covered the ball. Well, the case states that the defendant put the ball under a particular one of the cups, and, then, that the plaintiff selected that cup, as the one under which the ball was. Thus we must understand the case, because it states as a fact, that the defendant "placed the ball under *one* of the cups," and that the plaintiff "pointed to *the* cup," that is, the one under which he had seen the ball put, as being that which still covered it. We are not told how this matter was managed, nor do we pretend to know the secret. But it is indubitable, that the ball was, by deceit, not put under the cup, as the defendant had made the plaintiff believe, and under which belief he had drawn him into the wager; or that, after it was so placed, it was privily and artfully removed either before or at the time the cup was raised. If the former be the truth of the case, there was a false practice and gross deception upon the very point, that induced the laying of the wager, namely, that the ball was actually put under the cup. For, clearly, the words and acts of the defendant amount to a representation, that such was the fact; and indeed the case states it as the fact. Hence, and because we cannot suppose the vision of the plaintiff to have been so illuded, we rather presume the truth to be, that the ball was actually placed where the defendant pretended to place it, that is to say, under the particular cup which the plaintiff designated as covering it. Then the case states that the defendant raised that cup, and the ball was not there: a physical impossibility, unless it had been removed by some contrivance and sleight of hand by the defendant. Unquestionably it was affected by some such means; for presently we find the defendant in possession of the ball, ready for a repetition of the bet and the same artifice. Such a transaction cannot for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager, to be determined by a contingency in shew only, but in fact by a trick in jugglery by one of the parties, practiced upon the unknowing and unsuspecting simplicity and credulity of the other. Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, *in pari delicto*, with the juggling knave, who gulled and fleeced him. The whole was a downright and undeniable cheat; and the plaintiff parted with his money

under the mistaken belief, that it had been fairly won from him, and, therefore, may recover it back.¹

The judgment of nonsuit is reversed, and judgment for the plaintiff according to the verdict.²

PER CURIAM.

Judgment below reversed and
judgment for the plaintiff.

BROWNING v. MORRIS.

KING'S BENCH, 1778.

[*Cowper*, 790.]

UPON shewing cause why the verdict found in this case, for the plaintiff, should not be vacated, and a non-suit entered in its stead; Lord MANSFIELD reported in substance as follows: ' This was an action for *money had and received*. The plaintiff and defendant were both lottery-office-keepers; and during the drawing of the lottery, entered into an agreement mutually to insure the number of a ticket with each other, upon condition, that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he chose the price of an undrawn ticket which came to £14 3s.; and received that sum from the plaintiff. The next day, each insured another number upon the same terms. And so the contract was continued from day to day. It afterwards happened, that the plaintiff's number was drawn; when the defendant, instead of complying with the terms of the agreement as the plaintiff had done, refused to give the plaintiff either an undrawn ticket or the value of it. Neither of them had any tickets in their possession, the consequence of which is, that the contract was illegal, and against the statute. The question is, Whether the plaintiff is en-

¹So when the defendant substituted a false ticket which he pretended to draw from an illegal lottery, a recovery of the prize paid over was allowed. *Catts v. Phelan* (1844) 2 How. U. S. 376; or when a gambling concern made false statements as to its solvency. *In re E. J. Arnold & Co.* (1904) 133 Fed. 189.—ED.

²Contra: *Babcock v. Thompson* (1826) 3 Pick. 446.

A recovery has been allowed when the defendant was in a position to use undue influence; as a father, *Osborne v. Williams* (1811) 18 Vesey, 379, or on attorney, *Ford v. Harrington* (1857) 16 N. Y. 285; *Schoener v. Lissauer* (1887) 107 N. Y. 111; or when the defendant has exercised duress, as in *Hinsdill v. White* (1861) 34 Vt. 558, when the defendant for his promise not to prosecute, extorted money from a mother, whose son he falsely accused of theft; but on the subject generally, see section on *Duress*, ante, 154 *et seq.*—ED.

titled, in disaffirmance of the contract, to recover back the sum which he has paid upon this illegal transaction?

LORD MANSFIELD, on this day delivered his opinion as follows: The rule is, *in pari delicto, potior est conditio defendentis*: And there are several other maxims of the same kind. Where the contract is executed, and the money paid in *pari delicto*, this rule, as Mr. Dunning contended, certainly holds: And the party who has paid it, cannot recover it. For instance, in *bribery*, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are *equally criminal*. But where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; *there*, the parties are *not in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. For instance, by the statute of usury, taking more than 5 per cent. is declared illegal, and the contract void; but these statutes were made, to protect needy and necessitous persons from the oppression of *usurers* and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore the party injured may bring an action for the excess of interest. Another instance that occurs to me is the clause in the stat. 5 Geo. 2. c. 24, sect. 17, to prevent bad practices upon bankrupts, who have not obtained their certificate; and, who for the sake of obtaining it, will come into any terms, and cause their friends to come into any terms, which a hard creditor may chuse to impose. The statute prohibits "taking any money or security from the bankrupt himself, or any person in his behalf, as the *consideration for signing his certificate*." Suppose a creditor refuses, unless the bankrupt consents to give him a sum of money. The bankrupt gets the money from a friend or relation, and the creditor, in consequence, signs the certificate. The bankrupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may notwithstanding bring his action and recover the money back. And this, though he has acted contrary to law made for his own benefit. *Vide* Smith v. Bromley, Dougl. Rep. 670 n. This brings the present case within the determination of *Jaques v. Golightly*, in C. B. For in that case, the Chief Justice said, "the statute is made to protect the ignorant and deluded multitude, who in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And it is very material, that the statute itself, by the distinction it makes, has *marked the criminal*: For the penalties are all on *one* side; upon the *office-keeper*. The man who makes the contract, is liable to no penalty. So in usury,

there is no penalty upon the party who is imposed upon. It is true, that in these cases, the court will not assist the party who makes the illegal contract to recover any money he may win of the office-keeper; but he shall have this action for all the money which the office-keeper has got from him.¹

After Lord MANSFIELD had proceeded thus far, it occurred that the plaintiff was himself a lottery-office-keeper, and brought his action, not for money paid by him to the defendant for insuring; but for money paid by him to the defendant in consequence of his having insured the defendant's tickets. So that the plaintiff was not only in *pari delicto*, but also stood in the light and under the description of that species of insurer, from whom the statute meant to protect the unwary.

And the court were finally of this opinion (allowing the determination of the *Common Pleas* to be right) and accordingly, a nonsuit was entered.

¹Accord: *Jaques v. Golightly* (1776) 2 W. Blackstone, 1073; *Jaques v. Withy* (1788) 1 H. Blackstone, 65; *Barelay v. Pearson*, L. R. [1893] 2 Ch. 154; *Gray v. Roberts* (1820) 2. A. K. Marshall, 208; *Mount v. Waite* (1811) 7 Johns. 434. Upon the same principle, a recovery of a usurious rate of interest has been allowed; see p. 156. A recovery was allowed in *Williams v. Hedley* (1807) 8 East, 378, when the plaintiff had paid money to compromise a *qui tam* action for usury, "for the prohibition of 18 Eliz. C. 5 attaches only on the informer or plaintiff or other person suing out process in the penal action, making composition contrary to the statute," or when a statute prohibits an attorney from charging above a certain amount for his services. *Smart v. White* (1882) 73 Maine, 332; *Ladd v. Bartog* (1886) 64 N. H. 613. Likewise, in a similar case, a recovery was allowed upon the contract itself by Chief Judge PARKER in *Irwin v. Curie* (1902) 171 N. Y. 409; SELDEN, J., in *Tracy v. Talmage* (1856) 14 N. Y. 162, 181, said: "There are two classes of cases. . . . The first consists in a series of cases in which a distinction has been taken between those illegal contracts when both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim *ex dolo malo non oritur actio* is qualified by another, viz., in *pari delicto melior est conditio defendentis*. Unless, therefore, the parties are in *pari delicto*, as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, when equity requires it, to the more innocent party. . . . If *malum in se* the courts will in no case interfere to relieve either party from any of its consequences. But when the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced under it, relief will be granted to the party making the advance, 1, when he is not in *pari delicto*; or, 2, in some cases when he elects to disaffirm the contract while it remains executory."—ED.

WHITE v. THE FRANKLIN BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1839.

[22 *Pickering*, 181.]

WILDE, J., delivered the opinion of the Court. The first ground of the defence is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise, this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Stat. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This therefore was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell*, 17 Mass. R. 281; and the late Chief Justice, in delivering the opinion of the Court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same principle is laid down in *Springfield Bank v. Merrick*, 14 Mass. R. 322, and in *Russell v. De Grand*, 15 Mass. R. 39. In *Belding v. Pitkin*, 2 Caines's R. 149, THOMPSON, J., said "it is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In *Shiffner v. Gordon*, 12 East, 304, Lord ELLENBOROUGH laid it down as a settled rule, "that where a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two par-

ties to the other, on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is so laid down by Lord KENYON, in *Howson v. Hancock*, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavouring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law, that the plaintiff should recover." 2 Com. on Contr. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not *in pari delicto*. It is not universally true, that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not *in pari delicto*, the rule *potior est conditio defendentis*, is not applicable. In *Lacaussade v. White*, 7 T. R. 535, the court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle however is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties, or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of

sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of *Smith v. Bromley*, 2 Dougl. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord MANSFIELD laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendantis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of *Jones v. Barkley*, 2 Dougl. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office-keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. *Jaques v. Golightly*, 2 W. Bl. 1073. But in *Browning v. Morris*, Cowper, 790, it was decided, that where a lottery-office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office-keeper might be. The distinction, on which this case was decided, is very material in the present case. Lord MANSFIELD referred to the determination in *Jaques v. Golightly*, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And he adds, "it is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So in usury, there is no penalty noticed and enforced by Lord ELLENBOROUGH, in *Williams v. Hedley*, 8 East, 378. In that case it was decided, that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, &c." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be pre-

vented and restrained by the statute, it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly *in pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord ELLENBOROUGH fully approved the doctrine laid down by Lord MANSFIELD in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine has been confirmed. The same distinction has been recognized in other cases, and was adopted by this Court in *Worcester v. Eaton*, 11 Mass. R. 376, in which PARKER, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord MANSFIELD, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide, that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground, on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay, was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman*, Lofft, 342, where money had been paid, in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held, that he should recover, because the contract continued executory. This case was cited with approbation by BULLER, J., in *Lowry v. Bourdieu*, 2 Dougl. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were *in pari delicto*. The case of *Tappenden v. Randall*, 2 Bos. & Pul. 467,

was decided on that distinction. HEATH, J., said, "it seems to me, that the distinction adopted by Mr. Justice BULLER between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus penitentiae*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 3 Taunt. 277; 4 Taunt. 290.

In the case of *Aubert v. Walsh*, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In *Utica Ins. Co. v. Kip*, 8 Cowen, 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is however denied by the defendant's counsel, that the contract in question was executory, within the true intent and meaning of these decisions, and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the Court being clearly of opinion, that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion; which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold, that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In *Clark v. Moody*, 17 Mass. R. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to

recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.¹

Judgment on default.

DUVAL v. WELLMAN.

COURT OF APPEALS, 1891.

[124 *New York*, 156.]

BROWN, J. The record before us does not contain the pleadings, and we are not informed of the grounds upon which the plaintiff therein based his right to recover. The case has, however, been disposed of in defendant's favor in the court below on the ground that the contract between the parties, upon which the money was paid, was illegal, and that the plaintiff's assignor was *particeps criminis*, and equal in guilt with the defendant.

But whether the cause of action was based upon the contract, or upon the illegality of the contract, and in disaffirmance thereof, does not appear.

The questions discussed in the lower courts have, however, been regarded as of sufficient importance to receive the consideration of this court, and as they were the only ones discussed at our bar, we may confine our observations to them without regard to the particular issue made by the pleadings.

It appears from the evidence that the plaintiff is the assignee of Mrs. E. Guion, a widow lady, who, in her search for a husband, sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called "The New York Cupid," and the proprietor of a matrimonial bureau in New York City.

Mrs. Guion's testimony was to the effect that in June, 1886, she became a patron of the defendant's establishment, and paid the usual registration fee of five dollars. That she was introduced to thirty or forty gentlemen, but found none whom she was willing to accept as a husband, and that in June, 1887, for the purpose of stimulating the

¹Accord: *Parkersburg v. Brown* (1882) 106 U. S. 487; *Tracy v. Talmage* (1856) 14 N. Y. 162; the *Oneida Bank v. the Ontario Bank* (1860) 21 N. Y. 490. Likewise, it has been held that the corporation could revoke the consideration when the contract was neither *malum in se* or *malum prohibitum*, but merely not within its express or implied powers. *Leigh v. American Brake Beam Co.* (1903) 205 Ill. 147. As a corporation has constructive notice of its own *ultra vires* acts, it would seem that a demand prior to the action is immaterial, *Dill v. Wareham* (1844) 7 Mete. 438, and that, therefore, interest should run from the time of the loan. 3 *Columbia Law Review* 124, but see *Brennan v. Gallagher* (1902) 199 Ill. 207.—Ed.

defendant's efforts in her behalf, she paid him fifty dollars, whereupon there was executed the following instrument:

"June 2nd, 1887.

"Due Mrs. Guion from Mr. Wellman fifty dollars (\$50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Guion.

"(Signed.)

H. B. WELLMAN.

"E. GUION."

In August, 1887, Mrs. Guion, not finding a congenial companion among any of the men to whom she had been introduced and claiming to be willing to give up all acquaintance with them, demanded from defendant the return of the money paid, which, being refused, the claim was assigned to plaintiff and this action was commenced.

The five learned judges who have delivered opinions in the case have agreed that the contract between the parties was void, and this conclusion appears to be amply supported by authority. 1 Story Eq. Jurisprudence, §§ 260-264; 2 Pomeroy Eq. Jurisprudence, § 931; Willard's Eq. Jurisprudence, 211; Bacon's Abridgment, Title Marriage & Divorce, D.; Fonblanque's Eq. Ch. I, § 10; *Boynton v. Hubbard*, 7 Mass. 112; *Crawford v. Russell*, 62 Barb. 92.

Judge STORY, after discussing the grounds upon which courts of equity interfere in cases of this kind, says: "It is now firmly established that all such contracts are utterly void as against public policy * * *," and Chief Justice PARSONS said, in *Boynton v. Hubbard* (*supra*), that "these contracts are void * * * because they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."

The doctrine that marriage brokerage contracts are void is the outgrowth of the views and opinions of the English people upon the subject of the marriage relation, and the courts of England, for upwards of a century, have universally declared that the natural consequences of such agreements would be to bring about ill-advised, and, in many instances, fraudulent marriages, resulting inevitably in the destruction of the hopes and fortunes of the weaker party, and especially of women, and that every temptation in the exercise of undue influence in procuring a marriage should, therefore, be suppressed. The defendant has, however, succeeded in the lower court upon the application of the rule that a court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution if it be executory, or by rescinding it if it be executed.

Public policy has dictated the adoption of this rule, but it has its

limitations, and when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract and restoring him, so far as possible, to his original position. 1 Pomeroy's Equity, § 403; 1 Story's Equity, § 300.

It is not sufficient for the defendant to show merely that the other contracting party is *particeps criminis*, but it must appear that both are equal in guilt unless the contract be *malum in se*, in which case the maxim *Ex dolo malo non oritur actio* is of universal application.

This subject received very full consideration in the case of Tracy v. Talmage, 14 N. Y. 162, and it was there said that unless the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract is illegal, will afford relief to the more innocent party.

Upon the application of this doctrine, in Mount v. Waite, 7 Johns. Rep. 433, premiums paid for the insurance of lottery tickets were recovered, the plaintiff being held not to be equal in guilt with the defendants.

In Wheatan v. Hibbard, 20 Johns. Rep. 290, it was held that usurious interest paid by a borrower could be recovered independent of the statute, and that the maxim *inter partes in pari delicto potior est conditio defendantis* did not apply, as the law considered the borrower the victim of the usurer, and Lord MANSFIELD laid down the rule that in transactions prohibited by statute for the protection of one set of men from another set of men the parties are not *in pari delicto*. Browning v. Morris, 2 Cowp. 790. See also Schroepel v. Corning, 6 N. Y. 107-115, 116.

It will appear from an examination of the authorities upon this subject, a very few only of which are cited, that courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects *in pari delicto*.

In many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests, or a well settled policy of the law, whether that policy be declared in the statutes of the state or be the outgrowth of the decisions of the courts.

Accordingly many cases may be cited where relief has been granted from contracts which partook of the character of marriage brokerage agreements. The cases are collected in Pomeroy's Equity Jurisprudence, in a note to section 931: in Fonblanques Eq., B. I, ch. 4, §§ 10, 11, and Bacon's Abridgment, Title Marg. and Divrs. 541 *et seq.*, and need not be cited here.

In two of the cases referred to, money paid under the contract was recovered back. Smith v. Bruning, 2 Vern. 392; Goldsmith v. Bruning, 1 Eq. Cases Abr. 89.

The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

Contracts of this sort are considered as fraudulent in their character and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence.

The subject is classed by all text writers under the head of constructive or implied fraud, and it is upon the application of rules which belong to that branch of the law that the cases have been decided to which I have referred.

We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in guilt.

The learned General Term of the Common Pleas appeared to have considered that the voluntary character of Mrs. Guion's acts was decisive of this question and deprived her of the right of recovery.

It is true there is no evidence of actual over-persuasion or undue influence.

But at most the inferences to be drawn from these facts were for the jury.

The prominent fact in the case is that such a place as the defendant maintained existed in the community with its evil surroundings and immoral tendencies.

What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence

was not sufficiently strong to authorize the court to hold as a question of law that the parties were not *in pari delicto* it at least presented a question of mixed fact and law for the jury.

Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void, dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions.

We are of the opinion, therefore, that the Common Pleas erred in reversing the order of the City Court, and that a new trial should have been granted.

The order appealed from should be reversed, and the order of the General Term of the City Court affirmed, with costs.

All concur.

Order reversed.¹

TENANT v. ELLIOTT.

COMMON PLEAS, 1797.

[1 *Bosanquet & Puller*, 3.]

ASSUMPSIT for money had and received. Verdict for the Plaintiff.

The Defendant being a broker, effected an insurance for the Plaintiff, a *British* subject, on goods from *Ostend* to the *East Indies*, on board the *Koenitz*, an Imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the Defendant, who, without any intimation from them to retain the money, refused to pay it over to the Plaintiff.

Shepherd, Serjt., now moved for a rule to shew cause why the verdict in this case should not be set aside, and a nonsuit entered. By 7 Geo. 1. stat. 1. c. 21. s. 2. it is enacted "That all contracts and agreements whatsoever made or entered into by any of his Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies*, or parts in the said act before mentioned;

¹In *Smith v. Bruning* (1700) 2 Vernon. 392, "The court not only decreed a Marriage Brocage bond to be delivered up, but a gratuity of *fifty* guineas actually paid to be refunded"; chancery relieved against marriage brocage bonds from an early date. *Carleston v. Kent* (1620) Toth, 27; *Arundel v. Thevillian* (1634) 1 Ch. Rep. 87; *Hall v. Potter* (1695) Shower's Parliament Cases, 76.—ED.

and all contracts and agreements whatsoever made by any of his Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, treasure, or effects, or with any provisions, stores, or necessities, shall be and are hereby declared to be void." Now, the goods on board the *Koenitz* being the property of the Plaintiff, a subject of *Great Britain*, and the *Koenitz* being a foreign ship, bring this transaction within the provisions of the above act. In *Camden v. Anderson*, 6 Term Rep. 730, it was determined, that a policy effected in contravention of an act of parliament, made for the purpose of protecting the monopoly granted to the *East India* company, was void. The voyage being illegal, makes the policy illegal also. If then the Plaintiff could not have succeeded in an action against the underwriters, neither can he recover against the present Defendant. The Defendant is in the nature of a stake-holder: and the Plaintiff's right of action being grounded on his claim against the underwriters, he must now stand precisely in the same situation as if he had immediately sued them.

BULLER, J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the Defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over: who is entitled to it but the Plaintiff?

EYRE, Ch. J. The Defendant is not like a stake-holder. The question is, Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The Defendant took nothing by his motion.

BALDWIN BROS. v. POTTER.

SUPREME COURT OF VERMONT, 1874.

[46 *Vermont*, 402.]

GENERAL ASSUMPSIT. Plea. the general issue, and trial by the court, September term, 1873, ROYCE, J., presiding.

The case was tried upon the following agreed statement of facts: "The plaintiffs were merchants and partners, residing and doing business at St. Albans, Vt. They employed the defendant to solicit orders for and sell an article known and called 'prize candy,' on commission. It was the practice of the parties, under said employment, for the defendant to solicit and take orders for said goods,

and send such orders to the plaintiffs, who would thereupon send the candy to the parties ordering it, and charge it directly to the purchaser, on the plaintiffs' books, and for the defendant, when convenient, to make collections in respect thereof for the plaintiffs, receipt therefor, notify the plaintiffs thereof, and pay the amounts collected, over to the plaintiffs on demand.

"The defendant entered upon said business; and in November, 1870, and January, 1871, he sent orders for said candy for various parties in the state of New York, to the amount of \$103, and afterwards, in August and September, 1871, collected the pay for the same, as the plaintiffs' agent. In November and December, 1870, and February and March, 1871, the defendant sold, and sent orders to the plaintiff from various parties in the state of Massachusetts for said candy, to the amount of \$210.52, and afterwards, in August and October, 1871, collected pay for the same as the plaintiffs' agent. During the years 1870 and 1871, the defendant sold and sent orders for said candy from various parties in Vermont, to the amount of \$215.57, and afterwards, in August, September and October, 1871, collected the pay for the same as the plaintiffs' agent.

"On the delivery of said goods by the plaintiffs, they charged the same to the purchasers, on their books; and on receiving notice from the defendant of said collections, they credited to such purchasers the amounts thereof. The plaintiffs delivered to the defendant four silver dollars and four silver half dollars, as samples of the prizes contained in certain of said prize candy packages, which, with the premium thereon, were of the value of \$6.72, and which the defendant has never returned, nor accounted for, to the plaintiffs. It is agreed that the commission to which the defendant is entitled, is equal to, and shall be set off against, items in the plaintiffs' favor; specification not included in the amounts aforesaid.

"Said prize candies were of three kinds, and were known and called the 'Challenge,' 'Gem,' and 'United States Silver Coin.' and were put up in packages designed to be sold at retail for a certain price per package. Each package, in addition to a quantity of candy, contained a prize of some value; and the inducement to purchase one or more of the packages at retail, was the chance of receiving with the candy, a prize, some of which were of greater value, and some of less value, than the price paid. The plaintiffs, at St. Albans, put up said candy in packages, with a prize in each package, and put up the packages in boxes containing a certain number thereof. The plaintiffs sold said candy by the box only, and each box of the several kinds, contained the same amount of candy, and the same prizes, and the prizes contained in each box were printed on the outside, and on printed circulars; and cards were used by the plaintiffs, and the defendant as their agent, in connection with

the sale thereof, stating particularly the kind and value of each article contained in the box as a prize; and each purchaser thereof from the plaintiffs, was informed and knew the amount of candy, and the exact number, value, and kind of articles as prizes, contained in each box that he bought; and the plaintiffs knew that such purchasers intended to sell the same at retail, in the vicinity of the place of purchase, and that the prizes would be drawn as hereinbefore stated, by the retail purchasers thereof.

"In respect to said business, and in the collection of said money, the defendant acted solely as the agent of the plaintiffs. On the 18th of October, 1871, the plaintiffs demanded of the defendant to account to them for the money collected by him as aforesaid, and said silver coins, and to pay over the amount thereof to them, but the defendant absolutely refused, and ever since hath refused, so to do; and has never paid the same, nor any part thereof.

"If upon the foregoing facts the court is of opinion that the plaintiffs are entitled to recover for the sums as stated, which were collected upon sales in the states of New York, Massachusetts, and Vermont, or either of said states, or for said silver coins, judgment shall be rendered for the plaintiffs for such sums, and interest from the dates of collection of the money, and the date of the delivery of the coin. If the plaintiffs are not entitled to recover in respect of any of said items, then judgment shall be rendered for the defendant to recover his costs."

An agreement was also made as to some of the provisions of the statutes of New York and Massachusetts relating to offences against public policy, in force at the time of said sales. The court rendered judgment for the plaintiff, *pro forma*, to recover the full amount claimed, with interest thereon as stipulated; and found that the defendant received said money in a fiduciary capacity, and converted the same to his own use, and adjudged, *pro forma*, that the cause of action arose from the willful and malicious act and neglect of the defendant, and that he ought to be confined in close jail; to all which the defendant excepted.

The opinion of the court was delivered by PIERPOINT, Ch. J.

We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce them. If those contracts were illegal, the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the

purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid, it became the plaintiffs' money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise on the part of the defendant, to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce: no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract. I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods, does not vary the case. *Tenant v. Elliot*, 1 B. & P. 2; *Armstrong v. Toller*, 11 Wheat. 257; *Evans v. City of Trenton*, 4 Zab. (N. J.) 764.

We think the certificate granted by the county court was properly granted. It has been urged in behalf of the defendant, that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.¹

¹Accord: *Farmer v. Russell* (1798) 1 B. & P. 296; *Planters' Bank v. Union Bank* (1872) 16 Wall. 483, 499; *Murray v. Vanderbilt* (1863) 39 Barb. 140, 152; *Wilson v. Owen* (1874) 30 Mich. 474. Contra: *Woodson v. Hopkins* (Miss. 1905) 37 So. 1000. In *Planters' Bank v. Union Bank*, *supra*, STRONG, J., at p. 469, explained the distinction drawn in the principal case as follows: 'But when the illegal purpose had been consummated; . . . when the proceeds of the sale have been actually received . . . the court is not then asked to enforce an illegal contract to establish their case. It is enough that the defendants have in hand a thing of value that does not belong to them. . . . Though an illegal contract would not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin.'

The cases seem in dispute as to the right of one partner to recover from another the proceeds of an illegal business. When the transaction is *malum in se*, there is no doubt that a recovery should be refused. *Highwayman's Case* (Exchequer 1725), *ante*, 666.

(c) *The Contract is Unenforceable under the Statute of Frauds.*

(1) *The Defendant is in Default.*

HOLLIS v. EDWARDS AND ANOTHER.

IN CHANCERY, BEFORE SIR FRANCIS NORTH, L. K., MAY 1, 1683.

[1 *Vernon*, 159.]

IN these cases, bills were exhibited to have an execution of parol agreements touching leases of houses, and set forth that in confidence of these agreements the plaintiffs had expended great sums of money in and about the premises, and had laid the agreement to be that it was agreed the agreements should be reduced into writing. The defendants pleaded the statute of frauds and perjuries.

For the plaintiffs it was insisted on the saving in the act of parliament, viz., Unless the agreement were to be performed within the space of a year: but it was answered, that clause did not extend to

It would seem, however, that when the completed transaction was merely *malum prohibitum*, relief should be had either by an accounting, *Brooks v. Martin* (1863) 2 Wall. 70 [discredited by Mr. Justice PECKHAM in *Malley v. Hoffman* (1899) 174 U. S. 639, 666]; *Sharp v. Taylor* (1848) 2 Phill. 801; *Cook v. Sherman* (1882) 20 Fed. 167; *Manchester & Lawrence R. R. v. Concord R. R.* (1889) 66 N. H. 100; *Pfeuffer v. Maltby* (1881) 54 Tex. 454; or by an action sounding in Quasi-Contra, *Wann v. Kelly* (1881) 5 Fed. 584; *Robison v. McCracken* (1892) 52 Fed. 726; *Gilliam v. Brown* (1870) 43 Miss. 641; *McDonald v. Lund* (1896) 13 Wash. 412; contra, *Goodrich v. Houghton* (1892) 134 N. Y. 115.

In the jurisdiction last cited, denying a recovery, the court suggests that relief might be given were the partnership legal in its inception. See *Woodworth v. Bennett* (1871) 43 N. Y. 273; or if there had been a formal accounting, see *Leonard v. Poole* (1889) 114 N. Y. 371. These distinctions seem founded on the following dictum of MELLOR, J., in *Taylor v. Chester* (1869) L. R. 4 Q. B. 309, 314: "The true test of determining whether or not the plaintiff was in *pari delicto* is by considering whether the plaintiff could make out his case, otherwise than through the medium and by the aid of the illegal transaction." The suggestion appears untenable, as it is the duty of the court to take cognizance of any illegality on its own motion. *Claffin v. U. S. Credit Co.* (1896) 165 Mass. 501; *Richardson v. Buhl* (1889) 77 Mich. 632, 651; *Wright v. Rindskopf* (1877) 43 Wis. 344. It is submitted that the true reason for allowing a recovery in this class of cases is that it is more consonant with sound public policy than to permit one partner, by the plea of illegality, to appropriate to his own use money which has been given him to turn over to his associate. See the opinion of PIERREPONT, C. J., in *Baldwin Bros. v. Potter*, *supra*.—ED.

any agreement concerning lands or tenements. Then it was insisted for the plaintiffs, that undoubtedly they had a clear equity to be restored to the consideration they had paid, and to the money which they in confidence of the agreement had expended on the premises.

As touching that matter, it was said by the Lord Keeper, that there was a difference to be taken, where the money was laid out for necessary repairs or lasting improvements, and where it was laid out for fancy or humor; and that he thought clearly the bill would hold so far, as to be restored to the consideration: but he said, the difficulty that arose upon the act of parliament in this case was, that the act makes void the estate, but does not say the agreement itself shall be void;¹ and therefore, though the estate itself is void, yet possibly the agreement may subsist; so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity: and therefore directed, that the plaintiffs should declare at law upon the agreement, and the defendants were to admit it, so as to bring that point for judgment at law; and then he would consider what was further to be done in this case.²

¹"There are three views taken by the courts as to the effect of a failure to comply with the statute of frauds:

"1. That the statute affects not the contract, but simply the remedy for the breach thereof. *Leroux v. Brown*, 12 C. B. 801; *Kleeman v. Collins*, 9 Bush. 460; *Townsend v. Hargraves*, 118 Mass. 325.

"2. That the effect thereof is to make the contract a nullity. *Wilkinson v. Heavenrich*, 58 Mich. 574; *Crawford v. Parsons*, 18 N. H. 293; *Koch v. Williams*, 82 Wis. 186.

"3. That the effect thereof is to enable either party to rescind the contract. *Winters v. Elliott*, 1 Lea, 676; *Brakefield v. Anderson*, 87 Tenn. 206 (*semble*)."
Keener's Treatise, 232.

As to the meaning and interpretation of the statute, see also, *Catling v. King* (1877) 5 Ch. Div. 660; *Rossiter v. Miller* (1877) 5 Ch. Div. 648, S. C. (1878) 3 App. Cas. 1124; *Shardlow v. Cotterill* (1881) 50 L. J. Ch. 613; *Souch v. Strawbridge* (1846) 2 M. G. & S. 808; *Coombs v. Wilkes* [1891] 3 Chan. 77; *Davies v. Otty* (1864) 33 Beav. 540; *Shahan v. Swan* (1891) 48 Ohio St. 25; *Grant v. Ramsey* (1857) 7 Ohio St. 158; *Heaton v. Eldridge* (1897) 56 Ohio St. 87; *Steel Works v. Atkinson* (1873) 68 Ill. 421; *Baldwin v. Palmer* (1851) 10 N. Y. 232 (one voluntarily performing part of a contract, unenforceable because of the statute, does not thereby render himself liable to a suit for failure to perform the rest); *Lincoln v. Wright* (1859) 4 De G. & J. 16; *Britain v. Rossiter* (1879) 11 Q. B. Div. 123.—Ed.

²See *Hawley v. Moody* (1852) 24 Vt. 603.—Ed.

KING v. BROWN.

SUPREME COURT OF NEW YORK, 1842.

[2 Hill, 485.]

ERROR to the Chenango common pleas. Brown sued King before a justice of the peace, and declared upon a special agreement by which the defendant, in consideration of \$40, payable in work, agreed to convey to the plaintiff four acres of land: averring that the work had been done and that the defendant refused to convey. The declaration also contained the common counts for work, labor, &c. The defendant pleaded the general issue and, after trial, the justice rendered judgment for the plaintiff for \$100. The defendant appealed to the C. P. On the trial in that court it appeared that the contract was by parol—that soon after it was made, the plaintiff took possession of the land and made improvements upon it by erecting a house and clearing the greater part of it, and that a few months before the commencement of the suit the defendant sold the premises to one Hutchinson for \$100. Sufficient evidence was given to warrant the jury in finding that the contract had been fulfilled on the part of the plaintiff. The land, with the improvements, was proved to be worth from \$100 to \$140; but the evidence on that point was objected to by the defendant. The objection was overruled and the defendant excepted. The court charged the jury that if they found the plaintiff had fulfilled the contract and had gone into possession of the land by the consent of the defendant who had refused to perform the agreement on his part, or had put it out of his power to perform, then the plaintiff was entitled to recover the value of the land at the time the defendant should have conveyed; and that in estimating the value of the land the improvements should be taken into consideration. The defendant excepted to the charge, and the jury found a verdict for the plaintiff for \$120. After judgment, the defendant sued out a writ of error.

By the Court, NELSON, Ch. J. It is impossible to sustain the judgment in this case, however just and meritorious may be the claim, to the amount that has been recovered. The contract for the purchase of the land, resting in parol, is void under the statute of frauds and cannot be the foundation of an action. I am aware of the intimation by WOODWORTH, J., in *Burlingame v. Burlingame*, 7 Cowen, 92, that the plaintiff should declare on the special contract; but it is against the whole scope of the doctrine of the case itself, which went to show that the plaintiff must recover, if at all, under the general counts, on the ground that the contract was void. To hold it subsisting and valid, and the breach of it a good foundation for an action at law, the same as if in writing, would be virtually overruling the

statute of frauds and confounding principles that have been settled and acknowledged ever since its enactment. The true principle is this: the contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof, may treat it as a nullity and recover the money or value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default.

In the case before us, the compensation for the work to be done, was fixed by the parties; and assuming that the only remedy at law is the recovery of the value of the services thus rendered, under the general counts, it cannot exceed that amount, together with the interest. This is the rule also, where the contract is in writing and valid but has been rescinded by the parties; and is the measure of damages, moreover, where the vendee pursues his remedy upon the contract for default of the vendor. *Gillet v. Maynard*, 5 John. R. 85; *Gary v. Hull*, 11 *id.* 441; *Rice v. Peet*, 15 *id.* 503; *Baldwin v. Munn*, 2 Wend. 399; *Dimmick v. Lockwood*, 10 *id.* 142; Sugd. on Vend. 219, 222.

It is not important to enquire, whether a vendor who fraudulently refuses to perform the contract, and conveys to a third person at an enhanced price, might not be held responsible for the improved or enhanced value of the land, in an action brought upon the contract by the vendee; because in this case the agreement being void and not the subject of an action at law, even conceding the affirmative of the question, the plaintiff could not bring himself within the principle. In pursuing his remedy here, the contract must be laid out of view, as the cause of action rests entirely upon the work and labor done under it, unaffected by any question of damages that might have been involved, in case the agreement had been valid and the action founded upon the breach of it.

Judgment reversed.¹

COOK v. DOGGETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1861.

[2 *Allen*, 439.]

CONTRACT to recover back \$100, paid by the plaintiff as a portion of the price of land, under an oral contract for the purchase thereof with the defendant, which the defendant afterwards refused to fulfil; and the expense of cutting and gathering into the defendant's barn the grass thereon.

¹See *Smith v. Smith* (1860) 4 Dutch. 208.—ED.

At the trial in the superior court, the plaintiff introduced evidence tending to show that the defendant sold to the plaintiff a farm, with certain personal property thereon, for \$5500, and orally agreed to prepare and execute a deed thereof, he receiving at the time \$100 to bind the bargain, and the plaintiff agreeing to pay the residue upon delivery of the deed; that afterwards the parties met for the purpose of completing the transaction, and the defendant refused to fulfil his contract, under circumstances not necessary to be stated here in detail; that the plaintiff was prepared to pay the money, and the defendant knew it; and that after the making of the contract the plaintiff entered into possession of the land, and cut the grass, and put it into the defendant's barn, and the defendant had the benefit of it; but there was no evidence of any request by the defendant for him to cut it.

METCALF, J. An action for money had and received lies for recovering back money paid by a party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform. *Gillet v. Maynard*, 5 Johns. 85. *Browne on St. of Frauds*, § 122. This is not denied by the defendant; but he contends that this action cannot be maintained, because the plaintiff did not tender to him the rest of the money which, by the terms of their oral agreement, he was to receive for performance of his part of that agreement.

It is very clear, on the authorities, that the judge, at the trial, correctly instructed the jury that if the defendant refused to perform his part of the contract, the plaintiff could maintain this action by showing that he was ready to perform on his part, without showing that he made a tender. According to the contract, concurrent acts were to be done by the parties; the defendant to execute a deed, and the plaintiff to pay money. In such a case, when one party refuses to do what he had engaged to do, the other party need not do, nor formally offer to do, what he had engaged to do; readiness to do it being all that he needs to allege or prove. 1 Saund. 320 *e.* note 5; *Adams v. Clark*, 9 Cush. 215, & cases there cited; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; *Jackson v. Allaway*, 7 Scott, N. S. 875, and 1 Dowl. & Lowndes, 919; *Boyd v. Lett*, 1 C. B. 222; *Smith v. Lewis*, 26 Conn. 110. In the last case, Chief Justice STORRS said: "Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability, on the part

of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed constitute and imply an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering." These remarks are applicable to some of the cases which were cited by the defendant's counsel.

The judge also correctly instructed the jury that the plaintiff could not recover for the expenses of cutting the hay, as it was not cut at the defendant's request. There was no express or implied undertaking by the defendant to pay for cutting the hay; the work was done, or caused to be done, by the plaintiff, for his own benefit, on the faith that the defendant would convey the land agreeably to his oral engagement, which the plaintiff must be supposed to have known he could not by law enforce. *Gillet v. Maynard*, 5 Johns. 85; *Shreve v. Grimes*, 4 Littell, 220, 224; *Welsh v. Welsh*, 5 Ohio, 267; *Browne on St. of Frauds*, § 119.

*Exceptions of both parties overruled.*¹

Jellison v. Jordan (1878), 68 Me. 373. On exceptions, by the defendant, to instructions stated in the opinion. APPLETON, C. J. This was an action on an account annexed and for money had and received.

It was in evidence, that the defendant bargained with the plaintiff to sell him a small farm for a sum of money down and the balance on time, the defendant to give a warranty deed and to receive

¹See also, *Nelson v. Shelby Mfg. Co.* (1892) 96 Ala. 515; *Bedell v. Tracy* (1892) 65 Vt. 494; *Stevens v. Van Ness* (1892) 19 N. Y. Supp. 950; *Buck v. Waddle & McGarraugh* (1824) 1 Ohio, 357; *Morgan v. Bitzenberger* (1845) 3 Gill, 351; *Pulbrook v. Lawes* (1876) 1 Q. B. Div. 284. Equity has followed the same rule, decreeing a recovery of the consideration. *Harrison v. Belcher* (1680) Freeman, 484; *Leak v. Morris* (1680) 1 Dick. 14, S. C. (1682) 2 Ch. Cas. 135; *Anonymous*, 2 Eq. Cas. Ab. 46, p. 12.

A recovery is also permitted against one who by arrangement between the parties has taken the legal title under an oral promise to convey later to the plaintiff, and has failed so to do. *Stinchfield v. Milliken* (1880) 71 Me. 567; *Leman v. Whitley* (1828) 4 Russ. 423; *Davis v. Whitehead* [1894] 2 Ch. 133; *Campbell v. Dearborn* (1872) 109 Mass. 130, or where he fails to perform some act promised. *Giffen v. Taylor* (1894) 139 Ind. 573. As to the question who must bring action in such cases, see *McGovern v. Hern* (1891) 153 Mass. 308.—ED.

from the plaintiff his notes for the balance of the purchase money secured by mortgage. The plaintiff went into immediate possession of the premises and has ever since remained there. The plaintiff made the cash payment and gave the notes and mortgage. The defendant was to get his wife to sign the deed and then deliver the same to the plaintiff. The plaintiff went on; paid a portion of the notes under an expectation that he should have his deed, which the defendant repeatedly promised to give him. Finally, the plaintiff demanded his deed which the defendant refused to deliver, and commenced the process of forcible entry and detainer, which is now pending. Thereupon the plaintiff, on account of such refusal and the previous refusal and neglect of the defendant to deliver a deed, brought this action to recover back what he had paid.

The instruction to the jury was that the action might be maintained, notwithstanding the plaintiff had not surrendered the possession of the premises, and although the notes were not fully paid when the action was commenced.

The plaintiff has done as he agreed. He is in the right. The defendant has refused to perform his contract. He is in the wrong. The contract between the parties related to real estate and is within the statute of frauds. The plaintiff cannot enforce its performance. The defendant had the election to perform it or not. The plaintiff had no such election. He could not rescind the contract, if he would, if the defendant was willing to perform. *Kneeland v. Fuller*, 51 Maine, 518, 519; *Plummer v. Bucknam*, 55 Maine, 105.

The defendant, having alone the option to perform or not, has elected not to perform his contract. It then has no validity as a contract. The defendant has the money of the plaintiff in his hands in part performance of a contract which he has voluntarily repudiated. It is well settled that an action for money had and received lies to recover back money paid by a party to an agreement invalid by the statute of frauds, which the other party refuses to perform. *Cook v. Doggett*, 2 Allen, 439.

The fact that the plaintiff is in possession of the premises to be conveyed affords no defense to his claim. In *Richards v. Allen*, 17 Maine, 296, the plaintiff had been in possession, eighteen or twenty years, of the farm the defendant had promised, under circumstances like those in the present case, to convey; but the action was nevertheless maintained. If the possession of the plaintiff was rightful it can furnish no defense to the defendant, especially when the defendant has been allowed for the use of the premises from the time of the plaintiff's entry thereon to the date of the writ, as in *Richards v. Allen*.

If the plaintiff's possession was wrongful, his wrong doing can furnish no defense for the wrong doing of the defendant. The plaintiff is entitled to compensation from the defendant. If he has violated any

rights of the defendant, he is amenable to the law for such violation in a suit therefor.

Exceptions overruled.

WALTON, BARROWS, DANFORTH, PETERS and LIBBEY, JJ., concurred.

KNOWLMAN v. BLUETT.

IN THE EXCHEQUER CHAMBER, JUNE 12, 1874.

[*Law Reports*, 9 *Exchequer*, 307.]

APPEAL by the defendant from a decision of the Court of Exchequer refusing a rule to enter a nonsuit. L. R. 9 Ex. 1.

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her £300 per annum, by equal quarterly instalments, for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old. For several years the plaintiff maintained and educated the children, and the defendant paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The plaintiff continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears.¹

BLACKBURN, J. We are of opinion that the Court of Exchequer was right in refusing a rule in this case. The bargain between the parties was that if the plaintiff would take care of and maintain the children, the defendant would pay her £300 a year as long as she did so. This arrangement was never revoked, and the plaintiff having taken care of and maintained the children, now sues for arrears due to her. It is said that the action is not maintainable because there is no memorandum in writing of the bargain. But the plaintiff has performed her part of it, and it would be unjust if she could not obtain repayment of the sums she has expended. She could have maintained an action for "money paid at the defendant's request," and it would have been no answer to have said that the term in respect of which she was suing was longer than a year, and that the agreement which fixed the rate of remuneration was one not to be performed within a year. We think that in substance her present claim is for money paid, although the declaration is in form upon a special contract.

KEATING, MELLOR, LUSH, GROVE, and ARCHIBALD, JJ., concurred.

Judgment affirmed.

¹This statement of facts is taken from the head notes.—Ed.

La Du-King Manufacturing Co. v. La Du (1887), 36 Minn. 473. The plaintiff and defendant entered into a parol contract by the terms of which the defendant was to serve the company in the capacity of treasurer for the term of five years for a certain percentage of the profits. Defendant thereupon entered upon such service, and continued therein under such service for upwards of two years, when he left the same on account of sickness. During the time he was working, he retained from funds that came into his hands, a certain amount for his services. For this the plaintiff sued. VANDERBURGH, J., in the course of his opinion said: "We are required to further consider the case as left by the findings of the referee. Could the defendant maintain an action for a *quantum meruit*, upon the case as presented, the plaintiff not being in default, but ready and willing to abide by the contract as made?"

In *King v. Welcome*, 5 Gray, 41, the plaintiff rendered service for the defendant under a special parol contract for a term longer than one year, but left the service before the year expired. The defendant insisted upon a fulfilment of the contract, but it was held that the plaintiff might recover for the value of his services, irrespective of the contract, which was not available as a defence under the statute of frauds. Substantially the same rule was adopted in *Shute v. Dorr*, 5 Wend. 204, and in *Comes v. Lamson*, 16 Conn. 246. This strict rule is, however, regarded as harsh and inequitable by other courts and by text-writers, who find it difficult to be reconciled in principle with the doctrine generally recognized in the case of parol contracts to sell land, that money paid by the purchaser cannot be recovered if the vendor stands ready to fulfil the contract on his part. *Coughlin v. Knowles*, 7 Met. 57; 39 Am. Dec. 759; *Collier v. Coates*, 17 Barb. 471; *Abbott v. Draper*, 4 Denio, 51; *Browne*, St. Frauds (4th Ed.) §122*a*. See 1 Smith, Lead. Cas. (8th Ed.) 632; 2 Chit. Cont. (11th Ed.) 852, and notes; 2 Wait, Law & Pr. (5th Ed.) 390. The principle that the right to recover in such cases depends upon the question of the defendant's default was recognized by this court in *Johnson v. Krassin*, 25 Minn. 117, and *Sennett v. Shehan*, 27 Minn. 328; 7 N. W. Rep. 266. And the doctrine is nowhere denied. *Collier v. Coates*, *supra*.

In *Galvin v. Prentice*, 45 N. Y. 162, the court lay down the broad rule that, where services are rendered under an agreement within the statute of frauds because not evidenced by writing, no action can be maintained to recover their value except upon the default of the other party, or his refusal to go on with the contract. The contract was not illegal, and it was still in force, though no action could be maintained on it. One party cannot, therefore, declare it rescinded at his will, without cause, and proceed as upon an *implied assumpsit* against the other party to it, while he stands ready to fulfil it according to its terms. *Abbott v. Inskip*, 29 Ohio St. 59; *Erben v. Loril-*

lard, 19 N. Y. 299, 304; *Britain v. Rossiter*, 11 Q. B. Div. 123; *Van Valkenburg v. Croffut*, 15 Hun, 147, 152; *Whiting v. Sullivan*, 7 Mass. 107.

The objection suggested to the adoption of the rule is that urged very pointedly in *King v. Welcome*, *supra*, viz., that it enables the defendant practically to enforce or avail himself of the express contract, in violation of the spirit, if not the letter, of the statute, to defeat plaintiff's action upon implied contract. But, as before suggested, where is the distinction in principle between *Galvin v. Prentice* and *Abbott v. Draper*, *supra*, the doctrine of the latter case (in relation to parol land contracts) being universally recognized? *Collier v. Coates*, *supra*; *Browne*, St. Frauds, §122a.

We do not deem it necessary in this case to determine between the rule laid down in *King v. Welcome* and *Galvin v. Prentice*, or whether the rule would have been different if defendant had left plaintiff's service without cause. It is found that defendant left plaintiff's service for good cause, on account of sickness. In such case the servant is entitled to his *pro rata* wages, or the value of his services, not exceeding the compensation fixed by the agreement under which the service was rendered. *Clark v. Gilbert*, 26 N. Y. 279; 84 Am. Dec. 189; 2 Chit. Cont. 851; *Wolfe v. Howes*, 20 N. Y. 197, 203; 75 Am. Dec. 388; *Clark v. Terry*, 25 Conn. 395; *Ryan v. Dayton*, *id.* 188; 65 Am. Dec. 560; *Philbrook v. Belknap*, 6 Vt. 383; *Seymour v. Cagger*, 13 Hun, 32; *Fuller v. Brown*, 11 Met. 440.

In *Clark v. Terry*, the earlier case of *Comes v. Lamson*, *supra*, was explained and greatly limited, and the court say: "In respect to the question whether wages have been earned which ought to be paid, and if so to what extent or amount, and when the payment ought to be made, it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered."

This rule we think applicable in the case at bar. There are some exceptions to it, but they are not important to be here considered. The principle upon which a recovery is permitted in such cases is that the employer shall do what his duty or justice requires, and this cannot be fully discovered upon any other theory than above suggested. The referee ruled correctly that in this case the defendant's compensation must be limited by the contract; and, as no profits were found to have been yet realized, it did not appear that he was entitled to any counterclaim against the money of plaintiff in his hands. Plaintiff is therefore entitled to judgment for the amount claimed, and the defendant is remitted to his remedy by action for any proportion of the earnings or profits of the

company he may eventually be found entitled to. *Clark v. Gilbert, supra.*

Order affirmed.¹

Koch v. Williams (1892), 82 Wis. 186. The plaintiffs and defendants mutually agreed that the plaintiffs, architects, should draw plans for and superintend the erection of buildings for the defendants, and the defendants should give as compensation therefor certain real estate. The work was finished to the satisfaction of defendants, but the plaintiffs refused to accept the real estate bargained for, and sued for the reasonable value of their services. ORTON, J., speaking for the court, said: The contract the parties made was *oral*, and that, by our statute * * * is absolutely void and a nullity.

First, then, we are compelled to hold this contract void. In defense of this action the defendants set up and seek to enforce this oral contract for the sale of the lot as payment for the services of the plaintiffs. The English statute 29 Car. II., and the statutes of many of our states copied from it, do not make the contract void, but only voidable. The authorities cited by the learned counsel of the appellants are under that statute. Under a statute like ours, the authorities uniformly hold that such a contract is void, and that nothing will take it out of the statute except such part performance on the part of the purchaser, by entering into the possession of the premises, as would render him a trespasser if the agreement is held void, and even in such a case the relief can be sought only in a court of equity. In *Cameron v. Austin*, 65 Wis. 652, this principle is applied, where the plaintiff, who had sued, as here, for his services that were to be

¹Accord: *Crawford v. Parsons* (1846) 18 N. H. 293.

Where a plaintiff received for a time an agreed amount for services on a contract, void by the statute, and then was discharged before the time stipulated by the void contract, a recovery on *quantum meruit* for a greater sum than received was denied. *Cohen v. Stein* (1884) 61 Wis. 508; and see, *Deyo v. Ferris* (1886) 22 Ill. Ap. 154.

Of course a recovery should be permitted if the defendant prevents the plaintiff from completing the contract. *Frazer v. Howe* (1883) 106 Ill. 563; *Littell v. Jones* (1892) 56 Ark. 139; *Reed v. McConnell* (1892) 133 N. Y. 425; or if the part performance has been accepted. *Baker Bros. & Co. v. Lauterbach* (1887) 68 Md. 64; *Ray v. Young* (1855) 13 Tex. 550 (a recovery permitted against the estate of one accepting); *Aiken v. Nogle* (1891) 47 Kan. 96; *Gray v. Hill* (1826) Ryan & Moody, 420; *Savage v. Canning* (1867) 1 Irish, C. L. 434.

And see as to the rule in equity in such cases, *Buckingham v. Ludlum* (1883) 37 N. J. Eq. 137.

Although a contract is void under the statute, it may be shown to rebut the presumption of a mere gratuity between near relatives. *Kettry v. Thumma* (1894) 36 N. E. 919.—Ed.

paid for by a conveyance of land, had gone into possession and made improvements on the land, to defeat the action. Without such part performance by the purchaser, the contract was held void. In the late case of *Popp v. Swanke*, 68 Wis. 364, the oral contract was to sell and convey a tract of land in payment for lumber. The action was for specific performance of the contract by the defendant, upon full performance by the plaintiff by the delivery of the lumber. The defendant and his wife executed a deed to the plaintiff, and left it in the hands of a third person *in escrow*, to be delivered to the plaintiff on the delivery of the lumber, and, after receiving the lumber, the defendant refused to permit such third person to deliver the deed. This was going a great way towards a full performance by both parties, and yet this court held that the contract was void by our statute and could not be enforced, and that nothing less than possession by the purchaser could take the contract out of the statute. Chief Justice COLE very clearly distinguished our statute from the English statute, citing and following the able opinion of Chief Justice DIXON in *Brandeis v. Neustadt*, 13 Wis. 142, and the other cases in this court. See, also, *Smith v. Finch*, 8 Wis. 245; *Blanchard v. McDougal*, 6 Wis. 167; *Madigan v. Walsh*, 22 Wis. 501; *Thomas v. Sowards*, 25 Wis. 631; *Campbell v. Thomas*, 42 Wis. 439.

Second. The plaintiffs, having rendered valuable services to the defendants under this void contract, are entitled to recover what such services were reasonably worth. This, at first blush, might appear to be a hardship on the defendants, who never agreed to pay for such services in money, and have offered to pay according to the oral contract by a conveyance of the lot. But it is inevitable, from holding the contract void. The statute must be complied with as long as it is in force. It is no hardship to put such a contract in writing, and if parties suffer by not complying with the statute it is a penalty due to their own negligence, and they have no reason to complain. As said by the late Justice TAYLOR, in *Salb. v. Campbell*, 65 Wis. 405: "The statute making the parol contract absolutely void, it furnishes no ground of action in favor of the plaintiff, nor can it be used by the defendants as a basis upon which to found a defense. The parties stand in the same relation to each other as though no express contract existed between them. . . . and the plaintiff may recover upon a *quantum meruit* for the work done upon an implied promise of the defendants to pay what the services are reasonably worth." In *Cohen v. Stein*, 61 Wis. 508, Chief Justice COLE said: "Under the decisions of this court there can be no doubt as to the correctness of the proposition that, where a person renders services under a contract which is void, he can recover upon a *quantum meruit* the value of such services." See, also, *Brandeis v. Neustadt*, 13 Wis. 142; *Thomas v. Sowards*, 25 Wis. 631; *N. W. U. Packet Co.*

v. Shaw, 37 Wis. 655; *Clark v. Davidson*, 53 Wis. 317; *Thomas v. Hatch*, 53 Wis. 296.

The finding of the court as to the services of the plaintiffs and value thereof appears to be sustained by the testimony. The other exceptions of the appellants are not material to the merits of the case.

By the Court. The judgment of the circuit court is affirmed.

DAY, RESPONDENT *v.* THE NEW YORK CENTRAL RAIL-
ROAD COMPANY, APPELLANT.

COMMISSION OF APPEALS OF NEW YORK, 1873.

[51 *New York*, 583.]

APPEAL from judgment of the General Term of the Supreme Court in the eighth judicial district, affirming a judgment in favor of the plaintiff, entered upon a verdict.

The complaint contained two causes of action; and for the first cause alleged in substance that in May, 1855, the plaintiff agreed to convey to the defendant about an acre and two-thirds of an acre of land, together with the right of ingress and egress, to and from the land so to be conveyed, to the plaintiff's land, and to build and keep in repair cattle yards and pens for live stock, sufficient to accommodate the shipping or transporting such stock to and from the cars to the plaintiff's land, adjoining the land so to be conveyed, free from any expense to the defendant; and that the defendant should temporarily deliver to the plaintiff, from that time forward, for temporarily keeping and feeding, all the cattle, swine and live stock which should be transported on its road eastward from the Niagara River, the profits of such keeping and feeding to be realized by the plaintiff; that the defendant, for that purpose, requested the plaintiff to build, make, and construct the necessary yards, pens, and so forth, for the temporary feeding and keeping such live stock; that a conveyance of the land was made by the plaintiff to the defendant, and the necessary yards, pens, and other conveniences for doing business, contemplated by the agreement, were constructed by the plaintiff; that the defendant disregarded the agreement entered into on its part, and refused to allow the live stock transported on its road to be delivered temporarily to the plaintiff for feeding and keeping, and refused to allow the plaintiff the enjoyment of the profits he would have realized by keeping and feeding such stock.

The second cause of action was an *indebitatus assumpsit* for land sold and conveyed, for a right of way for use and occupation of land and premises, for work and labor, care and diligence, and for materials furnished, and for construction of cattle yards, etc., for the defendant.

The answer was a general denial.

The first cause of action only was contained in the original complaint, and the action was tried on that issue in November, 1858, and a verdict rendered for the plaintiff for \$4,384. On appeal to the General Term, a new trial was ordered, on the ground that the agreement on the part of the appellant, being verbal only, was void by the statute of frauds, for the reason that it was not to be performed within one year, and also that it created a negative easement on the lands of the plaintiff. 5 Johns. 85.

The plaintiff then amended his complaint, adding thereto the second count, and a second trial was afterward had, and a verdict recovered by the plaintiff in 1867 for \$2,500. On a second appeal to the General Term, a new trial was ordered on the ground that the damages should have been confined to the value of the land conveyed by the plaintiff. 2 Hill, 439.

On the third and last trial, damages were recovered only for the actual value of the land conveyed by plaintiff to the defendant, with the interest.

EARL, C. The point was not taken by the defendant at any stage of the trial, that the plaintiff had not given sufficient proof tending to establish the parol agreement claimed by him, to wit: That in consideration of the conveyance of the land to the defendant, it was to give to the plaintiff at his yards and pens the business of temporarily keeping and feeding all the stock which should be transported upon its road eastward from Niagara River. Hence we must assume, for the purposes of the appeal, that the parol agreement, as testified to by the plaintiff, was established. We must also assume that this agreement was void under the statute of frauds, for such is the claim on the part of the defendant, and it was upon this theory alone that the recovery was based, and upon it alone the plaintiff seeks to uphold the judgment. As the consideration for the plaintiff's land, the defendant agreed to pay him one dollar and to give him the stock business at his yards. It paid him the one dollar and gave him all the business for the year 1855 and part of it for the year 1856, and out of this business the plaintiff made profits to the amount of about \$6,000. And yet he brings this action to recover the entire value of the land conveyed by him on the ground of a total failure of the consideration of his conveyance. A mere statement of the case shows that the action must be without foundation.

If one pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid, in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. *Gillet v. Maynard*, 5 Johns. 85;

King v. Brown, 2 Hill, 439; Cook v. Doggett, 2 Allen, 439; Erben v. Lorillard, 19 N. Y. 299; Richards v. Allen, 17 Me. 296.

While the law in such case will not sustain an action based upon the agreement, it still recognizes its existence and treats it as morally binding, and for that reason will not give relief against a party not in default, nor in favor of a party who is in default in his performance of the agreement.

A party who has received anything under such an agreement, and then has refused to perform it, ought in justice to pay for what he has received, and hence the law for the purpose of doing justice to the other party will imply an assumpsit.

An assumpsit is never implied except where the justice and equity of the case demand it. A party entering into an agreement, invalid under the statute of frauds, is charged with knowledge that he cannot enforce his agreement, and if he, not being in default, has received part of the consideration of his agreement, upon what principle of justice or equity will the law imply an assumpsit on the part of the party in default still to pay the entire consideration? Yet such an assumpsit has been enforced in this case.

Suppose one agree by parol to work for another for ten years for the consideration of \$500, to be paid at the end of that time, and also a piece of land to be conveyed to him, and at the end of the time the \$500 be paid and the conveyance of the land refused. can he, upon an implied assumpsit, recover the entire value of his services? If he has received no part of the consideration agreed to be paid to him, the law will imply a promise to pay him what his services are worth, and will enforce such promise. But what shall be done when he has received part of the consideration? He should not be left without any remedy for the balance honestly due him, but upon the same principles of justice and equity the law should imply a promise to pay the balance.

Here the plaintiff was to receive for his land one dollar and the stock business at his yards. The one dollar may be regarded as merely nominal, and the other must be held to be the substantial consideration. The plaintiff expected to get the value of his land in the profits which he should make out of the business which the defendant should give him. This business the defendant gave to the plaintiff for one year, at least, just as it agreed to, and out of it the plaintiff appears to have made profits much greater than the value of the land conveyed. These profits were the very consideration contemplated by the parties for the conveyance of the land, and to the extent that the plaintiff has had the business and profits, he has had the very consideration he contracted for. Suppose the defendant had agreed to pay plaintiff \$100 and also to give him the stock business, could the plaintiff in this action after receiving the \$100 recover the whole value of the land, entirely ignoring the money payment? Suppose, instead of

giving the defendant land. the plaintiff had paid it money for the same consideration, could he, under the circumstances of this case, recover back all the money paid in an action for money had and received? Clearly not. The very basis upon which the action rests forbids it. As said by Lord MANSFIELD, in *Moses v. Macferlan*, 2 Burr. 1005, "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case." And he says the action "is equally beneficial to the defendant. It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand or to any part of it." And in *Longchamp v. Kinny*, 1 Dougl. 137, the same learned judge says: "Great benefit arises from a liberal extension of the action for money had and received, because the charge and defence in this kind of action are both governed by the true equity and conscience of the case." It would be against both equity and good conscience to allow the plaintiff in the case supposed to recover all the consideration which he had paid, when he had already received a part of the benefit and consideration which he had contracted for. Within the principles laid down in the cases cited he would be permitted to recover the balance only of the money paid by him after deducting the value of so much of the consideration as he had received, and if it could be shown in such case by the defendant that plaintiff had actually received from the defendant upon the agreement more than he had paid, there would be no basis of law or equity for the action to stand on. The same principles of justice and equity should be applied to this case. The plaintiff's equities can be no greater that he paid in land than in money. The agreement cannot be enforced. Neither party can in this action be allowed any benefit from it or any damage for its breach. The defendant having repudiated the agreement, the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he has received more in the profits of the business which the defendant brought to him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance.

It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action. They were part of the consideration received by him for his conveyance, and he has the same right to hold them as if so much money had been paid to him by the defendant. His claim is against the defendant for the

balance, if any, of the value of the land. These views are fully supported by well-recognized principles of law. I find no authority in conflict with them, and the case of *Richards v. Allen*, 17 Maine, 296, is the only authority which has come to my notice directly in point. In that case there was a verbal contract between the plaintiff and defendant for the purchase and sale of a farm, and the plaintiff had delivered to the defendant upon the contract a quantity of brick and a yoke of oxen. After the plaintiff had been in possession of the farm for about twenty years the defendant conveyed it to another person and refused to convey to the plaintiff. He then sued the defendant in assumpsit for the value of the brick and oxen, and it was held that he could recover, but that he must allow for the use of the land. The court says: "But the plaintiff's claim must be limited to what is just and equitable under all the circumstances. He had made some payments, but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it."

My conclusion, therefore, is that the judgment should be reversed and new trial granted, costs to abide event.

All concur except JOHNSON, C., not sitting.

*Judgment reversed.*¹

DOWLING v. MCKENNEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1878.

[124 *Massachusetts Reports*, 478.]

CONTRACT. The declaration contained three counts. The first was to recover \$200, on an account annexed, for "furnishing materials for, and labor and work in making, a monument." The second was as follows: "And the plaintiff says that he made an agreement with the defendant to furnish materials and construct for her a monument for the sum of two hundred dollars; that he furnished materials and made said monument for the defendant, and tendered the same to the defendant; and that she owes him therefor the sum of two hundred dollars." The third was on an account annexed, and contained the following items: "To ten days' labor on monument, \$50. To three days' services in preparing land and foundation for same, \$15." Answer, a general denial.

At the trial in the Superior Court, before DEWEY, J., the plaintiff

¹See as to measure of recovery *Parker v. Tainter* (1877) 123 Mass. 185.—Ed.

testified that he was a manufacturer of monuments and grave-stones, keeping on hand stock and partly finished monuments, to be finished to order; that the defendant came to his shop and said she would like to get a monument; that he showed her several monuments partially manufactured, among them the one in question, the price of which he told her was \$250, when finished with base, cap, and plinth, and polished; that she said she had some land, and he said perhaps they might trade with the piece of land; that if he could get a piece of land at a reasonable price he might trade with her; that if she would sell the land at the same price for which she had sold another piece, he would trade with her for the monument; that they went on the land and looked at the lots, for one of which she asked \$435; that he told her he would throw off \$50 on the monument, calling it \$200 complete, if she would throw \$35 off on the lot, and would give her \$100 in cash, and \$100 later, and the monument completed with the inscription, for the lot of land; and that to this proposition she agreed, and the lot was selected and agreed on.

There was also evidence that subsequently the plaintiff purchased a plinth, and one of his workmen worked three or four days, fitting and polishing the monument, putting on the cap and mouldings, and one-third of the inscription, which the defendant had given him to be put on the monument, at the time of the original contract, was put on, taking three days' work; that the defendant then notified the plaintiff that she would not take the monument, as she had been advised it was too large, and refused thereafter to take it; that subsequently the plaintiff completed the monument and inscription, and offered to deliver it to her, and pay her \$100 cash and give her his note for \$100, secured by mortgage on the land, and demanded a deed of the land; that she refused to accept the monument, money, and note, and refused to deliver him a deed of the land.

Upon this evidence, the plaintiff contended that he had the right to recover the sum of \$200 for furnishing materials and completing the monument, and that, if he could not recover for the materials or the monument, he had a right to recover for his labor in completing the monument. The defendant contended that the Gen. Sts. c. 105, § 1, cl. 4, and § 5, were a bar to the action. The judge, by consent of parties, before verdict, reported the case for the determination of this court. If, on this evidence, the action could not be maintained, judgment was to be entered for the defendant; otherwise, the case to stand for trial.

EXDICOTT, J. It appears from the report that the defendant orally agreed to convey to the plaintiff a lot of land valued at \$400, and to take, in exchange or payment therefor, a monument, estimated to be of the value of \$200, when completed, and the balance in money. After the monument was finished, the plaintiff tendered it to the defendant, together with the balance in money, according to the con-

tract. The defendant refused to accept the monument or money, or to give the deed.

Whether this was a sale or an exchange of property is immaterial. Assuming that it was an exchange of the land for the monument, with a balance in money to be paid by the plaintiff, it is to be governed by the same rules as apply to a sale when the whole consideration is to be paid in money. *Anon.*, 3 Salk. 157; *Commonwealth v. Clark*, 14 Gray, 367, 372; *Howard v. Harris*, 8 Allen, 297. The contract was therefore within the prohibition of the statute of frauds, Gen. Sts. c. 105, § 1. cl. 4. The oral promise on the part of the defendant was not to pay money for the monument, but to convey a lot of land. If the promise had been to pay in money for the monument, when completed, it might have come within the rule, that an agreement to construct or build an article to be paid for when finished need not be proved by a memorandum in writing, as in *Mixer v. Howarth*, 21 Pick. 205. But that view of the case cannot be sustained on the evidence as reported; it does not appear to have been the intention of the parties to make any contract, except that which included the conveyance of the land, which was the sole consideration moving from the defendant. That contract was not in writing, and cannot be enforced, in whole or in part. The plaintiff cannot separate that portion which relates to the building of the monument from the whole, and recover upon it as a distinct undertaking. This would be to make a new contract between the parties; for it was no part of the agreement, as stated, to pay \$200 in money for the monument, but to allow that sum as a portion of the consideration for the conveyance of the land. The plaintiff therefore cannot recover, either upon his first or second count, for the value of the monument.

But the plaintiff contends that he may, under his third count, recover for his labor in completing the monument. It is true, that when a person pays money, or renders service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the services rendered or the property conveyed; but it is on the ground that a party who has received a benefit, under an agreement which he has repudiated, shall be held to pay, upon an implied assumpsit, for that which he has received. *Dix v. Marcy*, 116 Mass. 416, and cases cited. In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument, as charged in the account annexed to the third count.

But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand,

and the work was done upon it, we cannot say as matter of law that it was not of benefit to the defendant. That is a question of fact to be determined, and by the terms of the report the entry must be

*Case to stand for trial.*¹

IN *Kelly v. Thompson* (1902) 181 Mass. 122, LORING, J., said: The defendant now contends "the rule of law to be that where two parties have made an agreement which is invalid by reason of the statute of frauds and one party has paid money or other valuable consideration relying upon said invalid agreement, that if this agreement is repudiated by the party who has received the money, that the party paying the money can recover the sum in an action of assumpsit for money had and received," and cites *Thompson v. Gould*, 20 Pick. 134; *Cook v. Doggett*, 2 Allen, 439; *Williams v. Bemis*, 108 Mass. 91; *White v. Wieland*, 109 Mass. 291; *Dix v. Marey*, 116 Mass. 416; *Root v. Burt*, 118 Mass. 521; *Parker v. Tainter*, 123 Mass. 185; *Holbrook v. Clapp*, 165 Mass. 563; *Miller v. Roberts*, 169 Mass. 134.

But the rule established by the cases cited by the defendants is not accurately stated by him, and does not support his contention in this case.

That rule is that if a plaintiff has paid money, conveyed property, or rendered services under an oral agreement within the statute of frauds, which agreement the defendant wholly refuses to perform, he can recover the money paid, or the value of the property conveyed, or of the services rendered; in that case there is a total failure of consideration and the plaintiff can recover the value of any benefit inuring to the defendant as a result of the transaction. To the cases cited by the defendant may be added *Basford v. Pearson*, 9 Allen, 387; *Pulbrook v. Lawes*, 1 Q. B. D. 284; *Riley v. Williams*, 123 Mass. 506; *Dowling v. McKenney*, 124 Mass. 478; *O'Grady v. O'Grady*, 162 Mass. 290; and see *Kneil v. Egleston*, 140 Mass. 202, 204; and *Holbrook v. Clapp*, 165 Mass. 563, 564, 565. And further, where the plaintiff has performed his agreement in whole, but the defendant has performed his agreement in part only, and a benefit inures to the defendant as a result of the transaction, the plaintiff can recover on an implied promise to the extent of that benefit. *Williams v. Bemis*, 108 Mass. 91; *White v. Wieland*, 109 Mass. 291; *Dix v. Marey*, 116 Mass. 416; *Miller v. Roberts*, 169 Mass. 134. The ground of recovery in that case is that the defendant has got the plaintiff's property without having fully paid for it, or that the

¹Where an uncle of the plaintiff orally promised the latter, an emancipated infant, \$1000 if he would return and work for his father during his own minority, and the work was performed. Held, no recovery against the uncle's estate, as the contract was void under the statute, and the defendant received no benefit. *Bristol v. Sutton* (1897) 115 Mich. 365.—Ed.

plaintiff has paid the defendant in advance without receiving a *quid pro quo*. A recovery is had on the same principles as that given to a contractor who has erected a building on the defendant's land for which he cannot recover under the contract between him and the owner of the land, and which was recently discussed at length in *Gillis v. Cobe*, 177 Mass. 584.

(2) *The Plaintiff is in Default.*

COLLIER v. COATES.

SUPREME COURT OF NEW YORK, 1854.

[17 *Barbour*, 471.]

THIS was an appeal from a judgment of the Steuben County Court. The action was commenced before a justice of the peace, to recover back the sum of \$65 which had been paid by the plaintiff upon a parol contract for the sale of a farm by the defendant to the plaintiff. The complaint was for money lent, and money paid. The defendant denied the allegations in the complaint, and stated that if he had received any money from the plaintiff it was upon the condition that the defendant would enter into a written agreement with the plaintiff, at a future day, which the defendant alleged he was, and at all times had been, ready to do, and he further averred that he had suffered great damage and expense by reason of the plaintiff not performing his agreement. A parol agreement between the parties, for the sale of the defendant's farm to the plaintiff, was proved, and the price was agreed upon. The plaintiff paid to the defendant \$65 upon the contract, and was to pay, within a week or ten days, enough more to make \$200; and then a written contract was to be executed by the parties. Subsequently the plaintiff came back and told the defendant he could not make out the \$200, and therefore could not take the farm, and he sent word to the defendant, by his son, that he, the defendant, might have the \$65 the plaintiff had paid him for his damages, or he might pay back some part of it if he could afford to. The jury found a verdict in favor of the plaintiff for \$65, and the justice rendered judgment for that sum, with costs. On appeal the County Court affirmed the judgment.

By the Court.—JOHNSON, J. I regard the rule as well settled, in this country, at least, that where a person has paid money upon a parol contract for the purchase of lands, which is void by the statute of frauds, he cannot maintain an action to recover back the money so paid, so long as the other party to whom the money has been paid is willing to perform on his part.

The doctrine has been twice distinctly declared in our own court, where the question was directly before it. *Abbott v. Draper*, 4 Denio, 51; *Dowdle v. Camp*, 12 Johns. 451. The same question has been decided in the same way repeatedly in several of the courts of our sister States, where the point was directly involved. *Coughlin v. Knowles*, 7 Met. 57; *Thompson v. Gould*, 20 Pick. 132, 142; *Duncan v. Baird*, 8 Dana, 101; *Lane v. Shackford*, 5 N. H. 133; *Shaw v. Shaw*, 6 Vt. 75; *Richards v. Allen*, 5 Shep. 296; *Sims v. Hutchins*, 8 S. & M. 328; *Beaman v. Buck*, 9 S. & M. 257; *McGowen v. West*, 7 Miss. 569; *Rhodes' Adm'r v. Stow*, 7 Al. 346; *Dougherty v. Goggin*, 1 J. J. Marsh. 374; 2 J. J. Marsh. 563. In several of the cases above cited, the facts are almost identical with those of the case at bar. All the cases agree that if the party receiving the money refuses to perform the agreement, such as it is, on his part, the action lies.

I doubt whether any well-considered case can be found in the courts of this country, where the rule above laid down has been denied or even doubted. *Rice v. Peet*, 15 Johns. 503, is cited as holding a contrary doctrine, but it does not. That case turned upon the insanity of the plaintiff at the time of making the trade and turning out the note, which fact the court considered as established by the verdict of the jury. The court do indeed say that the plaintiff might have recovered upon the ground that the contract for the exchange of farms, on which the money was received, being by parol, was void. But the decision was evidently not placed upon that ground. And besides, although the defendant in that case alleged in his plea that the plaintiff had failed in performing his agreement, no evidence seems to have been given upon the subject, and there is nothing in the case to show who was, in fact, in fault in not carrying out the agreement to exchange farms. The decision upon the point presented by the finding of the jury does not impugn the principle contended for, and at most can only be regarded as a *dictum* the other way. But it is contended by the learned and ingenious counsel for the plaintiff that neither *Dowdle v. Camp* nor *Abbott v. Draper* are authorities against the plaintiff's right to recover, because in each of those cases the plaintiff was in possession of the premises purchased, and might have enforced a specific performance of the agreement in a court of equity. In that respect, it is true, the two cases above cited differ from the case here, although several of the other cases cited do not. But I am unable to perceive how that circumstance affects the principle upon which the plaintiff claims the right to recover. The foundation of his claim is that the money was paid without consideration. That is, that having been paid upon a promise made by the defendant which the law would not compel him to perform, nor mulct him in damages for refusing to perform, and which was, in short, void by statute, it was paid without any consideration whatever which the law notices or regards. But this condition of the parties is not in the

least altered by the purchaser's going into possession, so far as the validity and force of the agreement is concerned. It is still void by the statute of frauds, notwithstanding the possession. Nothing is better settled than this, that part performance of a parol contract void by statute does not take it out of the statute, or give it any validity in law as a contract.

To whatever extent either or both of the parties may have gone in the performance of such a contract, it still remains of no legal or binding force in law, in every stage up to its full and final performance and execution by both. If it is conceded that possession by the plaintiff, in addition to the payment, would have operated to defeat the recovery of the money paid, the whole ground of controversy is surrendered. It could make no difference as regards the right of action, so far as the question of consideration is concerned, whether the defendant had in fact performed in part or whether he was willing and offered to perform. Besides, when the other party is willing and offers to perform, the question as to whether the plaintiff could compel him to do so in case of his refusal, does not arise. It is clear enough that in case of a refusal the action lies, and the refusal is the ground upon which the action for the recovery is based. Certainly a willingness or an offer to perform must be regarded as placing the defendant in as favorable a situation as part performance, as regards the action at law.

Courts of equity, in decreeing the specific performance of such contracts, do not proceed upon the ground that the contract has any force or validity in law, but only that it is binding in conscience, and its performance specifically is decreed, expressly to prevent fraud, and for the very reason that in law it is of no force. What courts of equity might do, or refuse to do, can have no bearing upon the legal effect of such a contract. The last act or payment by either party, or both, short of full performance, is as much without consideration in law as the first. If the rules of equity are to be permitted to affect the legal right of recovery, the defendant may safely invoke them in his behalf in the present case. But they are not; and in determining the question here, in the action at law, they may as well be laid entirely out of view. It is by no means a universal rule that money paid, without a consideration good in law, may be recovered back. There are several exceptions to it. And I take this to be one which is well established by numerous adjudications.

The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had a right to make and carry out. There was no fraud or mistake of facts. The money was voluntarily paid by the plaintiff, upon a promise made by the defendant, which the former knew at the time he could not oblige the latter to perform, but which promise,

nevertheless, he agreed to accept as a sufficient consideration for the money parted with. The money was not received by the defendant as a loan, but as a payment. It was not received to the plaintiff's use. And as long as the defendant is willing to do what he agreed to do, in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement, until the defendant refuses to carry it out. Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser. And it is asked if it is right to give one party such an advantage over the other? It would be easy to suggest cases of hardship on the other side, if the right to recover in any case were to be controlled by any such considerations. Take the case at bar, for an example. The evidence shows that when the plaintiff entered into the arrangement with the defendant and made the payment, the latter was engaged in putting in a crop of wheat; that the plaintiff requested the defendant to suspend operations, as he would want to put the land to some other use, and that the defendant did suspend, and waited, expecting the plaintiff to fulfil his engagement, until it was too late to put in his crop; in consequence of which he was injured to the amount of over \$100.

But suppose the whole purchase price had been paid, and the defendant, in the confident expectation of the plaintiff's acceptance of the title, had gone and purchased another farm with the money, and involved himself in liabilities which would be utterly ruinous should the other party be allowed to repudiate and recover back the money. It may be asked, would it be right to allow him to do so? It is sufficiently obvious, however, that neither the plaintiff's right to recover back the money, nor the defendant's right to retain it, can rest in, or derive any aid from, such considerations as these. The principle which governs is more fixed and stable. It is clear that, by the rules of equity, the plaintiff could not recover until he had first made the defendant whole for the damage he had occasioned by the breach of his engagement, or offered to do so. And the law will not, I think, aid the party thus in the wrong, by presuming a promise of repayment, in his favor, until the other party shall refuse to go on and carry out the agreement upon which the money was paid. The rule which I suppose to be established seems to me to be one founded in reason and good sense, which ought to be upheld. And I regard it as being too well settled upon authority to be departed from, except upon the most cogent reasons, and from the clearest convictions of its

unsoundness. I am of opinion, therefore, that the judgment of the County Court and that of the justice should be reversed.

ABBOTT v. INSKIP.

SUPREME COURT OF OHIO, 1875.

[29 *Ohio State*, 59.]

MOTION for leave to file a petition in error to the District Court of Brown County.

The plaintiff, an infant, sued the defendant to recover the value of work and labor performed by the plaintiff for the defendant between February, 1871, and February, 1875.

The defendant in his answer set up that the work and labor sued for were rendered under a verbal contract entered into between the defendant and the plaintiff's mother in the year 1864.

That at the date of the contract the plaintiff was only nine years old, and was in the custody and under the control of his mother, who was entitled to his earnings and labor during infancy. By the terms of the contract the plaintiff was to live with and serve the defendant until he arrived at twenty-one years of age, in consideration of which defendant was to provide him with food, clothing, medicine, and education, etc., and, upon arriving at age, was to give him a horse, saddle, bridle, etc. That the defendant had performed, and was willing to perform all the conditions on his part, but the plaintiff without cause had left his home and service before arriving at age.

A demurrer to the answer was overruled, and plaintiff replied.

On the trial in the court of common pleas verdict and judgment were rendered for the defendant. This judgment was affirmed by the district court.

MCLLVANE, J. There is no question made as to the right of the plaintiff's mother to have bound him by a written contract duly executed.

The contention of the plaintiff in error is:

1. That the agreement set up in the answer was void under the statute of frauds.

2. That the plaintiff in error was not bound by it under the statute concerning apprentices and servants.

It is true that the agreement could not have been performed within a year from the making thereof, and, therefore, under the statute of frauds, it could not have been enforced by action. It might, however, have been performed by the parties, and, when performed, the parties would have been bound by it; or, if the plaintiff had performed, the defendant would have been bound to perform it on his part.

The plaintiff in his action below relied on an implied promise, on the part of the defendant, that he would pay the plaintiff the reasonable value of his services. The express promise contained in the agreement, under which the plaintiff assumed to render the service, excludes the presumption of the implied promise relied on. The default of the defendant, or his refusal to go on with a contract which falls within the statute of frauds, is an essential condition of the right to recover for services rendered under it. It is only in cases where the defendant, by reason of his own breach of such contract, is estopped from setting it up as a defense that an action for the value of the work done under it can be maintained.

That the contract was not executed in conformity to the statute concerning apprentices and servants is not a good reply to such contract. Such want of conformity no doubt discharged the plaintiff from the duty of remaining with the defendant. But, upon his voluntary withdrawal from the service, it gave him no right of action to recover for services rendered under the contract for the reasons above stated.

Motion overruled.

Galvin v. Prentice (1871), 45 N. Y. 162. The plaintiff, by an oral contract, undertook to work for defendant for three years at specified wages, part of which was to be retained until the end of the term, with the understanding that if the plaintiff voluntarily left before that time this sum was to be forfeited. He worked about two years and then stopped. The evidence was conflicting as to whether or not he was discharged. In an action brought for the amount retained, the lower court, asserting that it was immaterial who was in default under the contract, directed a verdict for the plaintiff, for the reasonable value of the services.

RAPALLO, J. That part of the charge of the judge, in which he instructed the jury, that the contract, although void, might be considered *prima facie* evidence of the value of the services, was, under the circumstances of this case, erroneous; and the exception thereto was well taken.

The contract price of the services was fixed with reference to a continuous service of three years. It appeared, upon the plaintiff's own showing, that the contract was that he should work for three years, and be paid the portion of his wages now in question, only in case he served three years, or was discharged for want of work.

The plaintiff claimed that he had been discharged, but the evidence on that point was conflicting, and the judge charged the jury that the discharge had nothing to do with the case. It cannot be assumed, therefore, that the fact of discharge was established.

It appeared that the plaintiff was to learn the business in which

he was employed. It cannot be supposed that his work was of the same value during the prior part of the term of his employment, as it would be during the latter part, when his proficiency must naturally have increased. The price agreed upon for the three years was not, therefore, competent evidence of the value of the services during the first and second years, and the contract, being void by the statute, could not be so far enforced as to determine the rate of compensation.

The exception to the ruling on that point is fatal to the judgment. But it must not be inferred that we agree to the proposition, that if there had been a correct ruling on the question of damages, the plaintiff would have been entitled to recover without proving that he was discharged, or that the defendant was in default.

Where payments are made, or services rendered upon a contract void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments or the value of the services, in an action upon an implied assumpsit.

But to entitle him to maintain such action he must show that the defendant is in default. *King v. Brown*, 2 Hill, 487. The rule is very clearly stated in *Lockwood v. Barnes*, 3 Hill, 128, as follows: "A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received."

So in *Dowdle v. Camp*, 12 Johns. 451; *Abbott v. Draper*, 4 Denio, 51, 53; and *Collier v. Coates*, 17 Barb. 471, it was held that money paid on a parol contract for the purchase of lands, which is void by the statute of frauds, cannot be recovered back unless the vendor refuses to perform; and to the same effect are numerous decisions of the courts of our sister States, referred to in *Collier v. Coates*.

The default of the defendant or his refusal to go on with the contract is recognized as an essential condition of the right to recover for services rendered or money paid, under any description of contract void by the statute of frauds. *Erben v. Lorillard*, 19 N. Y. 302 and 304; *Burlingame v. Burlingame*, 7 Cow. 92; *Kidder v. Hunt*, 1 Pick. 328; *Thompson v. Gould*, 20 Pick. 134, 142.

When the contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for a part performance.

The express promise appearing upon the plaintiff's own showing, although it cannot be enforced by reason of the statute, excludes any implied promise. *Whitney v. Sullivan*, 7 Mass. 109; *Jennings v. Camp*, 13 Johns. 96. *Expressum facit cessare tacitum*. *Merrill v. Frame*, 4 Taunt. 329; *Allen v. Ford*, 19 Pick. 217.

The effect of the statute is to prevent either party from enforcing performance of the verbal contract against the other, but not to make a different contract between them.

An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance. *Munro v. Butt*, 8 Ell. & Bl. 738; *Smith v. Brady*, 17 N. Y. 173; 13 Johns. 94; 8 Cow. 63; or where, after the making of the contract, full performance has been rendered impossible, by death or otherwise, without fault of the contracting party. *Wolfe v. Howes*, 20 N. Y. 197.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM and FOLGER, JJ., concurred; GROVER, J., concurred in the result on the ground of error in the charge; C. J. did not vote; ALLEN, J., dissented.¹

(2) THE DEFAULT IS WILFUL AND INEXCUSABLE.

(a) *The Defendant is in Default.*

DUTCH v. WARREN.

MICHAELMAS, AT GUILDHALL, COMMON PLEAS, 1721.

[1 *Strange*, 406.²]

CASE for money had and received to the plaintiff's use. The case was, the plaintiff paid money on a promise to transfer stock at a future day, which not being done the plaintiff brought this action. At the trial the doubt was, whether the plaintiff had brought a proper action, because at the time this money was paid the plaintiff never intended to have it again; and the promise to transfer the stock was a sufficient consideration for his parting with the money. The Chief Justice [KING] directed the court should be moved; and they were all of opinion, that the action was well brought; not for the whole money paid, but the damages in not transferring the stock at that time, which was a loss to the plaintiff, and an advantage to the defendant, who was receiver of the difference money to the use of the plaintiff.³

¹See, *Kruger v. Leppel* (1889) 42 Minn. 6, where the agreement was for services for a specified time at a specified gross sum, to be paid when the services were all rendered, and the party commenced to render services, but quit without cause: Held, no recovery.—ED.

²This case is more fully reported by Lord MANSFIELD in *Moses v. Macfarlan* (1760) 2 Burr. 1005, printed *ante*, p. 4, 7.—ED.

³The earlier cases were contra: *Brigs' case* (1623) Palm. 364; *Dewbery v.*

ANONYMOUS.

MICHAELMAS, AT GUILDHALL, 1721.

[1 *Strange*, 407.]

A MAN paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. Upon this the other brings his action for the money, as so much money had and received to his use. And the Chief Justice [KING] held, it well lay, because the thing contracted for was not delivered: he said it would have been otherwise, if the thing contracted for had been delivered, though to a less value.¹

Chapman (1695) Holt, 35; Anonymous (1696) Comb. 447. See also *Holmes v. Hall* (1704) Holt, 36, and same case more fully reported in 6 Mod. 161.

It will not escape the student's notice that the principal case misstates the nature and measure of recovery in such cases. The following passage from *Nash v. Towne* (1866) 5 Wall. 689, 701-02, is as accurate as it is concise:

"Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness. Anonymous, 1 *Strange*, 407; 2 *Greenleaf on Evidence*, 124.

"Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not in all, cases where the defendant has money of the plaintiff which, *ex æquo et bono*, he ought to refund. Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the non-delivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods, and that he has converted the same to his own use, the plaintiff, at his election, may have damage for the non-delivery of the goods, or he may have judgment for the price paid and lawful interest. Evidence in this case was clear not only that the plaintiffs paid the price in money, but that the defendants refused to deliver the flour, and converted the same to their own use, by selling and delivering it to other persons. *Allen v. Ford*, 19 *Pickering*, 217; *Jones v. Hoar*, 5 *id.* 285."—Ed.

¹See two admirable articles by Samuel Williston on the Repudiation of Contracts (14 *Harv. L. Rev.* 317-331; 421-441), upon the text and notes to which the present section is largely based. At page 318, note 1, Mr. Williston says: "The earliest cases allowing an action for restitution against a defendant guilty of breach of contract, and who might have been sued on the contract for damages, are *Dutch v. Warren*, 1 *Str.* 406, and Anonymous, 1 *Str.* 407, decided

TOWERS v. BARRETT.

KING'S BENCH, 1786.

[1 *Term Reports*, 133.]

ACTION for money had and received, and for money paid, laid out, and expended.

On the trial of this cause before Lord MANSFIELD, at the sittings at Westminster after last Michaelmas term, it appeared that this suit was instituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.¹

Lord MANSFIELD, C. J. I am a great friend to the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice.

In support of that action, I said in the case of *Weston v. Downes*, that I would guard against all inconveniences which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that; for if the parties come to trial on another ground, though there happen to be a general count for money had and received, I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that as well as the other ground.

But consistently with that guard, I do not think that the action can be too much encouraged. Here there is no pretence of a surprise on the defendant; there was no other question to be tried. The defendant knew the whole of the matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid

in 1721; but in the first of these decisions, though the action was in form for restitution, the plaintiffs' damages were restricted to the value of what he ought to have received by the contract. No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord MANSFIELD and Lord KENYON at the end of the eighteenth century."—Ed.

¹The arguments of the counsel are omitted. They relied principally upon *Power v. Wells* (1778) Cowp. 818; *Weston v. Downes* (1778) 1 Dougl. 23; *Moses v. Macferlan* (1760) 2 Burr. 1005, *ante* p. 4.—Ed.

to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that, he keeps the money.

The case was well put by Mr. J. ASHHURST in *Weston v. Downes*, and I think this is exactly like that. I was of opinion at the trial that this action would lie; and I still continue of that opinion.

WILLES, J. The only difficulty is to distinguish this case from that of *Weston v. Downes*; and I think it differs from that on two grounds.

That was an absolute, this a conditional agreement. And another more material difference is, that this agreement was at an end; the contract was no longer open.

In the case of *Weston v. Downes*, Mr. J. BULLER said, "This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses." But, in the present case, the defendant has precluded himself by taking back the chaise. I think the verdict is right.

ASHHURST, J. This action is maintainable; for it is different from the cases of *Weston v. Downes* and *Power v. Wells*. The latter was merely a case of warranty. In these actions the party cannot desert the warranty and resort to the general court, because the warranty itself is one of the facts to be tried.

As to that of *Weston v. Downes*: on the first contract there was an agreement to take back the horses, provided they were returned within a month: that would have been like the present case, if they had been returned within that time; but there was an end of the first contract, for the plaintiff took a second, and then a third pair of horses: that was a new contract, not made on the terms of the first, and that is distinguishable from the present case.

But laying that determination out of the question, this is like the common cases where either party puts an end to a conditional agreement. Here the condition was to return the chaise if not approved of; therefore, the moment it was returned the contract was at an end, and the defendant held the money against conscience and without consideration.

BULLER, J. On the very principle in *Weston v. Downes* and *Power v. Wells*, which determined that the action for money had and received would not lie in those cases, it is clear that this action will lie.

It is admitted that if the defendant had actually accepted the chaise the action would lie; but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him; he was bound to receive it, and therefore it is the same as if he had accepted it.

The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie.¹ But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract.²

¹"In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, 'I rescind this contract'—a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.' That principle is laid down and very well enforced in a variety of cases which were cited, and which will be found in Smith's Leading Cases, vol. 2, in the note to the case of *Cutter v. Powell*," per PARKE, B., in *Ehrensperger v. Anderson* (1848) 3 Ex. 148.

This case seems to represent the English law on the subject of repudiation, and is cited in Keener on Quasi-Contracts, 304, as a correct exposition of the law. *Freeth v. Burr* (1874) L. R. 9 C. P. 208, 214; *Mersey Steel and Iron Co. v. Naylor* (1884) 9 App. Cas. 434, 438. See also *Fay v. Oliver* (1848) 20 Vt. 118, 122.

"In some American cases, also, it has been said that mere breach of contract does not justify rescission, unless an intention is manifested to be no longer bound by the contract, or unless the wrongdoer has prevented performance by the other party. *Wright v. Haskell*, 45 Me. 489 (see, also, *Dixon v. Fridette*, 81 Me. 122); *Blackburn v. Reilly*, 47 N. J. L. 290; *Trotter v. Heckscher*, 40 N. J. Eq. 612; *Graves v. White*, 87 N. Y. 463; *Hubbell v. Pacific Mut. Ins. Co.* 100 N. Y. 41, 47 (*Comp. Bogardus v. N. Y. Life Ins. Co.* 101 N. Y. 328); *Suber v. Pullen*, 1 S. C. 273." Williston, l. c. 324. But see in regard to New York, *Welsh v. Gossler* (1882) 89 N. Y. 540; *Hill v. Blake* (1884) 97 N. Y. 216; *Mansfield v. N. Y. Central R. R. Co.* (1886) 102 N. Y. 205.

"This doctrine, though perhaps it is that of the English law to-day, must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify such a rescission of the contract, mutual assent of the parties must be established—and offer by the party in default accepted by the other party. In almost any case this can be established only by resorting to the baldest fiction. . . . In truth rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial nature as should constitute a defence to an action brought by the party in default for a refusal to proceed with the contract."

Williston, l. c. 323-325, and note 2, in which numerous authorities are cited.—ED.

²In *Goodman v. Pocock* (1850) 15 Q. B. 576, the plaintiff, a clerk, dismissed in the middle of a quarter, brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury were directed not to take into account the services actually rendered during the

In a late case before me on a warranty of a pair of horses to Dr. Compton that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely he must do it within a reasonable time, and that as he had not rescinded the contract he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old?

So that the difference in cases of this kind is this: where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end; but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it.

*Rule discharged.*¹

broken quarter, as they were not recoverable except under an *indebitatus* count; and they gave damages accordingly. The plaintiff then brought a second action to recover under an *indebitatus* count for his services during the broken quarter. In denying a recovery, COLERIDGE, J., said: "In a case like this the servant may either treat the contract as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract; but he cannot do both; and, if he has two counts, he must take the verdict on one only. Here the plaintiff elected to sue on the contract; and he cannot now sue in this form."

For the various inconsistencies in the nature of the recovery where the contract has been rescinded or repudiated, see Williston, l. c. 329-30 (where the cases are collected); Keener's Treatise on Quasi-Contracts, 306.

For the Roman and the modern civil law remedy in such cases, see Williston on Dependency of Mutual Promises, 13 Harv. L. R. 84, 85, 94-95.—Ed.

"If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had in England (Towers v. Barrett, 1 T. R. 133; Giles v. Edwards, 7 T. R. 181; Farrer v. Nightingal, 2 Esp. 639; Widdle v. Lyman, Peake, A. C. 30; Greville v. Da Costa, Peake, A. C. 113; Squire v. Tod, 1 Camp. 293; Wilde v. Fort, 4 Taunt. 334; Bartlett v. Tuchin, 6 Taunt. 259; Gosbell v. Archer, 4 N. & M. 485. So in the colonies, Wrayton v. Naylor, 24 S. C. Canada, 295; Wolff v. Pickering, 12 S. C. Cape of Good Hope, 429, 432), and in this country (Nash v. Towne, 5 Wall. 689; Lyon v. Annable, 4 Conn. 350; Thresher v. Stonington Bank, 68 Conn. 201; Barr v. Logan, 5 Harr. (Del.) 52; Payne v. Pomeroy, 21 D. C. 243; Trinkle v. Reeves, 25 Ill. 214; German, etc. Assoc. v. Droge, 14 Ind. Abb. 691; Wilhelm v. Fimple, 31 Ia. 131; Doherty v. Dolan, 65 Me. 87; Ballou v. Billings, 136 Mass. 307; Dakota, etc. Co. v. Price, 22 Neb. 96; Weaver v. Bentley, 1 Caines, 47; Cockroft v. Muller, 71 N. Y. 367; Glenn v. Rossler, 88 Hun, 74; Wilkinsson v. Ferree, 24 Pa. 190); Williston, l. c. 318-319.

In *Western v. Sharp* (1853) 14 B. Mon. 177, the court suggests a distinction (as to a recovery on a quantum meruit for services performed on a contract, the defendant defaulting) between sealed and unsealed instruments, saying: "The general rule has been, that where there is a special agreement, the action must be founded upon it, and that there can be no recovery upon a quantum meruit, or implied agreement, unless, by some default on the part of the plain-

THE CHESAPEAKE & OHIO CANAL COMPANY, PLAINTIFFS IN ERROR v. KNAPP AND OTHERS.

SUPREME COURT OF THE UNITED STATES, 1835.

[9 *Peters*, 541.]

IN error to the Circuit Court of the United States for the county of Washington, in the District of Columbia.

This was an action of assumpsit, instituted originally in the County Court of Montgomery county, in the state of Maryland; and by agreement of the parties transferred, with all the pleadings, depositions, and other proceedings therein, to the Circuit Court of the United States for the county of Washington, in the District of Columbia.¹

Mr. Justice M'LEAN delivered the opinion of the Court.

This case is brought before this Court, by writ of error to the Circuit Court for the District of Columbia.

The defendants here, who were plaintiffs in the Circuit Court, commenced an action of assumpsit to recover a large sum alleged to be due, for the construction of certain locks, &c., from the Chesapeake and Ohio Canal Company; and filed their declaration, containing nine general counts of indebitatus assumpsit, for work done and materials found, money laid out and expended, on account stated, &c.; and the defendants pleaded the general issue. On the trial, several exceptions were taken to the ruling of the Court, by the plaintiffs; and one exception was taken by the defendants, which presents the points for decision on the present writ of error.

The following is the instruction referred to. "In the further trial of this cause, and after the evidence and instructions stated in the

tiff, he is precluded from recovering on the special agreement, when, if he could not recover upon a *quantum meruit*, he would be without remedy, whatever might be the extent of the labor done by him for the other party, or of the benefit derived from it. In such case, however, the recovery for work done under the contract would be limited to the contract price.

"The rule, as above stated, requires that when the action can be maintained on the special agreement it should be founded upon it; and this rule is still more imperative and more important where, as in the present case, the special agreement is in writing, signed by the parties, and having the character and dignity of a sealed instrument. Such an agreement merges the verbal contract of which it takes the place, and it admits of no implied contract covering the same subject, unless when, according to the rules of law, there is no remedy upon the written agreement, when in order that there may be a remedy such contract is implied as justice and reason dictates."

But this distinction was not taken in *American Life Ins Co. v. McAden* (1885) 109 Pa. St. 399. And the better doctrine is that no such distinction exists in the nature of things. See *Ballou v. Billings* (1884) 136 Mass. 307, per HOLMES, J. And see *Williston*, l. e. 328; *Keener's Quasi-Contracts*, 308.—Ed.

preceding bills of exceptions had been given, and after evidence offered by the plaintiffs, of the payment of moneys to the labourers for the time during the detention, occasioned by the want of cement on locks 5 and 6, the plaintiffs, by their counsel, prayed the Court to instruct the jury, that if the jury believe, from the said evidence, that the defendants had, on the 2d of September, 1829, and from that time till the 20th day of January, 1830, contracted with the plaintiffs to furnish them with cement necessary, &c., in due time, &c., and that the plaintiffs, expecting that sufficient supplies of cement to go on with the work would be furnished by the defendants, as defendants had so engaged to do, hired a large number of hands, and brought them to the locks; and when the defendants had so failed to furnish the cement, kept the same hands idle, waiting for cement, on the defendants' desire that they should do so in order to be ready to go on with the work; and paid them their wages while so waiting: then the plaintiffs are entitled, under the count for money laid out and expended, contained in the declaration, to recover the money so paid to said hands, during such periods. But that the plaintiffs are not entitled to recover for wages paid to their workmen, on account of a deficiency of cement, after the said 20th day of January, 1830, unless the jury shall be satisfied by the said evidence, that the said resolution of the board of directors, of the 20th of January, 1830, was rescinded by the said board, and a new contract entered into thereafter by the defendants, to furnish cement to the plaintiffs, and the subsequent failure on their part so to furnish it, and an agreement also to pay for the wages of the plaintiffs' workmen while so waiting," &c.

The resolution referred to in the bill of exceptions, is in the words following:

"Resolution of the Board of Directors of the Canal Company in meeting, January 20th, 1830. Resolved, that although this board has stipulated to supply the contractors with water lime, yet the board will not be held responsible for any damages arising from the want of that article."

But the ground on which some reliance seems to be placed for the reversal of this judgment, and which, in the view of the Court, is one of the principal points presented by the record, is, that the jury were instructed to find for the plaintiffs below, on proof of a special contract, and under a declaration containing only general counts.

By the instruction of the Court, if the jury found, from the evidence, that the contract had been made by the defendants, as stated, and that the money had been paid to the hands detained for want of cement, the plaintiffs were entitled to a verdict on the count for money laid out and expended.

There can be no doubt, that where the special contract remains open, the plaintiff's remedy is on the contract; and he must set it

forth specially in his declaration. But if the contract has been put an end to, the action for money had and received, lies to recover any payment that has been made under it. The case of *Towers v. Barrett*, 1 Term Rep. 133, illustrates very clearly and fully this doctrine. In that case, the plaintiff recovered, on a count for money had and received, ten guineas paid to the defendant for a one horse chaise and harness, which were to be returned on condition the plaintiff's wife should not approve of the purchase, paying three shillings and six pence per diem for the hire, should they be returned: and as the plaintiff's wife did not approve of the purchase, they were returned, and the hire was tendered at the same time. "But if the contract remain open, the plaintiff's demand for damages arises out of it, and then he must state the special contract, and the breach of it."

It is a well settled principle, where a special contract has been performed, that a plaintiff may recover on the general counts. This principle is laid down by this Court, in the case of the *Bank of Columbia v. Patterson's Administrators*, 7 Cranch, 299, 2 Cond. Rep. 501. In that case, the Court say: "we take it to be incontrovertibly settled, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract not under seal, where the contract has been executed; and that it is not, in such case, necessary to declare upon the special agreement."

It would be difficult to find a case more analogous in principle to the one under consideration, than the above. The same questions, as to the right of the plaintiff to recover on the general counts, where the special agreement was performed; and, also, as to the powers of a corporation to bind itself, through the instrumentality of agents: were raised and decided in that case, as are made in this one. And it would seem, where this Court had decided the point in controversy, and which decision had never afterwards been controverted, that the question is not open for argument. But whether this doctrine be considered as established by the adjudications of this Court, or the sanction of other Courts, it is equally clear that no principle involved in the action of assumpsit, can be maintained by a greater force of authority.

In 1 Bacon's Ab. 380, it is laid down, that "wherever the consideration on the part of the plaintiff is executed, and the thing to be done on the defendant's part, is mere payment of a sum of money due immediately; or where money is paid on a contract which is rescinded, so that the defendant has no right to retain it; this constitutes a debt for which the plaintiff may declare in the general count: on an indebitatus assumpsit. Anciently, the count in such cases was special, stating the consideration as executory, the promise, the plaintiff's performance, and the defendant's breach; but the indebitatus has grown, by degrees, into use."

"So also if goods are sold and actually delivered to the defendant,

the price, if due in money, may be recovered on this count; and this though the price is settled by third parties." 1 Bos. and Pull. 397; 12 East, 1. "Where the plaintiff let to the defendant land rent free, on condition that the plaintiff should have a moiety of the crops; and while the crop of the second year was on the ground, it was appraised for both parties and taken by defendant: it was held that the plaintiff might recover his moiety of the value in indebitatus assumpsit, for crops, &c., sold: for by the appraisement, the special agreement was executed, and a price fixed at which the defendant bought the plaintiff's moiety."

The same principle is found in *Helps* and another *v. Winterbottom*, 2 B. and A. 431; *Brooke v. White*, 1 New Rep. 330; *Robson v. Godfrey*, Holt, 236; *Heron v. Gronger*, 5 Esp. 269; *Ingram v. Shirley*, 1 Stark. 185; *Forsyth v. Jervis*, 1 Stark. 437; *Harrison v. Allen*, 9 Moore, 28; *Bailey v. Gouldsmith*, Peake, 56; *Gandall v. Pontigny*, 1 Stark. 198; *Farrar v. Nightingale*, 2 Esp. 639; *Riggs v. Lindsay*, 7 Cranch, 500, 2 Cond. Rep. 585; *James et al. v. Cotton*, 7 Bing. 266; *Administrators of Foster v. Foster*, 2 Binn. 4; *Lkys v. Summerel*, 2 Browne, 227.

As, by the instruction of the Court, the jury must have found the contract executed by the plaintiffs below, before they rendered a verdict in their favour; we think the question has been settled by the adjudged cases above cited; and that on this point there is no error in the instruction of the Court.

But it is insisted, that, in their instruction, the Court lay down certain facts, as proved, which should have been left to the jury. If this objection shall be sustained, by giving a fair construction to the language of the Court, the judgment must be reversed; for the facts should be left with the jury, whose peculiar province it is to weigh the evidence, and say what effect it shall have.¹

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.²

¹The balance of the opinion of the court dealing with this question is omitted.—Ed.

²See note on the principal case in 3 Rose's Notes on U. S. Reports, 525, 526, in which the various authorities, Federal and State, are collected.—Ed.

MINER v. BRADLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1839.

[22 *Pickering*, 457.]

MORTON, J., drew up the opinion of the Court. This action, in which the plaintiff declares for money had and received and money paid, was brought to recover back the price paid for a quantity of hay. The cause was tried in the Court of Common Pleas. The facts upon which the plaintiff claimed to recover were as follows: The defendant, among other things, put up at auction a certain cow and 400 pounds of hay, which was then in a bay with other hay. The plaintiff bid off the cow and the hay for \$17, which he paid at the time. He then received the cow, and afterwards demanded the hay, which was refused by the defendant, who had used it. The defendant objected to the plaintiff's recovery, on the ground that this was an entire contract; that the plaintiff could not recover back the price paid, or any portion of it, without rescinding the whole contract, and that this could not be done without returning the cow. But the court overruled the objection, and instructed the jury, that upon the foregoing facts, if proved, the plaintiff was entitled to recover a sum equal to the value of the hay.

Upon the above statement, there can be no doubt, that in a proper form of action, the plaintiff might recover for the injury sustained by him, by the defendant's refusal to deliver the hay. But whether this action can be maintained, is the question now distinctly presented for our determination. It is to be regretted, that the plaintiff's claim must be decided upon mere matters of form, without regard to its merits. But still, with all the laxity in pleading which the liberality of the legislature and the courts has introduced into modern practice, some regard must be had to establish usages and forms. We cannot break down the well known distinctions between different modes of declaring, without endangering the principles of justice upon which they are founded. Had the plaintiff declared upon his contract for the purchase of the cow and the hay, he might have tried his case upon its merits. But having adopted a different form of action, he must rely upon different principles for its support.

The general rules of law upon which this case mainly depends, are well settled and familiar. This action is adapted to the repetition of all money paid by mistake or misapprehension of facts, or upon a contract for the purchase of property, either real or personal, where the consideration fails. If nothing passes, the purchaser may rescind the contract and recover back the money paid, and is not obliged to resort to any covenant or warranty, either express or implied. Whenever a contract is rescinded according to the original terms of it, the

purchaser may well recover the price as money had and received to his use. *Towers v. Barrett*, 1 T. R. 133. So where a contract is defeated by the negligence or misconduct of one party, the other may have his election either to rescind the contract and recover back the purchase money, or to enforce it, and recover damages for its breach. *Giles v. Edwards*, 7 T. R. 181. But if a party would rescind a contract, he must do it *in toto*. He cannot disclaim it in part and enforce it in part. So, also, the party rescinding must place the other party *in statu quo*. If this cannot be done, the contract cannot be rescinded. Hence if the contract be in any part executed, it cannot be discarded. 1 Dane's Abr. 177, 187; 4 Dane's Abr. 471; *Hunt v. Silk*, 5 East, 449; *Kimball v. Cunningham*, 4 Mass. R. 502; *Conner v. Henderson*, 15 Mass. R. 319.

To apply these principles, which the plaintiff himself does not controvert, to the case at bar. When the defendant refused to deliver the hay, it was such a violation of the contract on his part, as would have justified the plaintiff in rescinding it. And, had he done so, he would have been entitled to a return of the money which he had paid. This, however, he could only do by restoring the defendant to the situation he was in before the contract, viz., by returning the cow. But if he chose to retain her, his only remedy would be upon the special contract for damages for the conversion of the hay. This would have been peculiarly adapted to his case, and would have done exact justice between the parties. The damage which the plaintiff sustained by the defendant's breach of his contract might be more or less than the value of the hay or the price which might be supposed to be paid for it; and he would recover according to the injury suffered by him.

Again, as the cow and the hay were bought together for one gross sum, there are no means of ascertaining how much was intended for one, and how much for the other. Indeed it is not probable that the parties fixed any definite price to the articles separately. If so, it might not have been the same; and as there was no interchange of opinions, there could not be that agreement of two minds which constitutes a contract. There being, therefore, no price agreed upon and paid for the hay, none could be recovered back. The value of the hay, which would be differently estimated by different individuals, certainly could not be deemed the measure of the price. In this action only the exact amount of the money paid can be recovered back. The plaintiff argues, that this contract may be severed, either with or without the consent of the parties, so that it may be enforced as to part and rejected as to another part. Here is nothing tending to show any agreement to divide the contract, as it applies to the two subjects. So far from it, that the defendant denies that the hay ever was included in the contract.

There may be cases, where a legal contract of sale covering several articles may be severed, so that the purchaser may hold some of

the articles purchased, and, not receiving others, may recover back the price paid for them. Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule; because in effect, there is a separate contract for each separate article. This subject is well explained, and the law well stated, in *Johnson v. Johnson*, 3 Bos. & Pul. 162. In that case the plaintiff purchased two parcels of real estate, the one for £700, the other for £300, and took one conveyance of both. But the title to the latter was invalid, and he brought his action to recover back the consideration paid for it, and prevailed. Lord ALVANLEY, in giving the judgment of the court, said, "My difficulty has been how far the agreement is to be considered as one contract, for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain." "If the question were, how far the part of which the title has failed, formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered to say that he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains, might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it." "In this case, however, no such question arises; for it appears to me, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300, and the other for £700."

Had the plaintiff bid off the cow at one price and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case. But such was not the fact. And it seems to us very clear, that the contract was entire; that it was incapable of severance; that it could not be enforced in part and rescinded in part; and that it could not be rescinded without placing the parties *in statu quo*.

We think some confusion has been thrown over this contract by likening it to a promissory note, which may be enforced in part, though the consideration fail as to the residue. This subject was fully discussed in *Parish v. Stone*, 14 Pick. 198. The principles there laid down, which we recognize as sound, do not, in any degree, clash with the doctrine above stated. The cases are dissimilar. The object of the one was to determine, whether a contract defective in part might be enforced as far as it was valid, and how far it was to be

deemed valid; of the other, to determine in what cases and to what extent a contract may be rescinded and the consideration recovered back.

On the whole, we are of opinion that the instructions of the learned judge of the Court of Common Pleas were incorrect, and that a new trial must be granted. The case is remitted for that purpose.¹

CLARK v. MANCHESTER.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1872.

[51 *New Hampshire*, 594.]

ASSUMPSIT, by Geo. W. Clark against Manchester, upon the common counts, and a *quantum meruit* for work and labor. The plaintiff's claim was to recover for services as a laborer on the city farm, from April 13, 1870, to October 23 of the same year, by the employment of Joseph Cross, the defendants' agent. The evidence tended to show an employment for a year for \$300, or \$25 per month. It appeared that the plaintiff had drawn his pay monthly, at the rate of \$25 per month, from the city treasury, excepting \$23.08 due on the last month, which has been ready for him there ever since he left the defendants' employ, but which he declined to receive because he has claimed that he was entitled to more. The plaintiff left the defendants' employ October 23, 1870; and it was a question in dispute whether he left voluntarily, or was discharged without sufficient cause. The court instructed the jury that if they found the hiring to be for a year from April 13, whether the terms of the contract were \$25 per month or \$300 per year, and that the plaintiff was discharged Oct. 23, without sufficient cause, he

¹See 50 Am. Dec. 674, note; 74 *id.* 661, note for elaborate citation of authorities.—Ed.

"If a contract has been partly performed by the party in default, the other party, at least if he has received any benefit from such part performance, cannot ordinarily rescind the contract according to the English law. Even though he return what he has received, it is said the parties cannot be restored to their original position, because he has had the temporary enjoyment of the property. In the leading case of *Hunt v. Silk* (5 East. 449), the plaintiff, who sought to recover money he had paid under an agreement for a lease, because of the defendant's failure to make repairs as agreed, had had possession of the premises a few days. This was held fatal. . . . *Hunt v. Silk* has been consistently followed. *Beed v. Blandford*, 2 Y. & J. 278; *Street & Blay*, 2 B. & Ad. 456, 464; *Blackburn v. Smith*, 2 Ex. 783. See, also, *Heilbult v. Hickson*, L. R. 7 C. P. 438, 451. [*Suddoth v. Bryan* (1888) 30 Mo. App. 37, 43.] It is in accordance with this rule that a buyer is not allowed to rescind a contract for breach of warranty, *Street v. Blay*, 2 B. & Ad. 456;

would be entitled to recover so much as his services were reasonably worth during the whole period he worked, deducting what he had received, and also deducting the \$23.08, in case they were of opinion that it was the understanding that the plaintiff should go to the city treasury and there draw his pay. To this instruction the defendants excepted, on the ground that all claims were settled and discharged by payment and acceptance of pay by the plaintiff, at the rate of \$25 per month, up to about October 1; that in no event could the plaintiff be entitled to recover on a *quantum meruit* for more than the last month's work.

The verdict was for the plaintiff for \$109.33, which includes the \$23.08, the jury being of opinion that it was not part of the contract that the plaintiff should draw his pay at the city treasury.

The case was reserved.

SARGENT, J. The jury have found, upon the instructions given them, that the contract was to work for a year for \$300, or at the rate of \$25 per month for the whole year, and that the plaintiff received his \$25 per month up to October, and was turned away, without sufficient cause, at that time. In other words, the city broke or rescinded its contract with the plaintiff at the end of about six months, and after the plaintiff had worked through the very best of the season. He had worked during those months when he could have earned \$30 or \$35 per month, whereas for the balance of the year he might not be able to earn more than \$15 or \$20 per month.

If he had continued the year out, and had gone every month and received his \$25, that would have completed the contract on both sides, and that sum, by the month for the whole year, would have been payment in full for his services; yet, when the defendants rescind the contract in the midst of the term, without sufficient cause, they cannot claim that the payments which have been made, though at the rate per month stipulated for the whole time, shall be received in full for the *Gompertz v. Denton*, 1 C. & M. 207; *Poulton & Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 523, though there is the additional reason in the case of a warranty that it is said to be a collateral contract. In the United States the law is more liberal. It is universally agreed that rescission is not allowable unless the party seeking to rescind can and does first restore or offer to restore anything he has received under the contract [citing *Miner v. Bradley*, 22 Pick. 457, and numerous other cases], but the construction of this rule is far less severe than in England. . . . Thus in many of the States, rescission is allowed for breach of warranty [citing numerous authorities pro and con]. The most satisfactory disposition of many cases where the plaintiff cannot, without any fault on his part, return all he has received, would be to allow the plaintiff to recover subject to a deduction for what he has received and cannot return, and some authorities seem to support such solution of the problem. See Keener, *Quasi-Contracts*, 305; *Wilson v. Burks*, 71 Ga. 862; *Todd v. Leach*, 100 Ga. 227; *Brewster v. Wooster*, 131 N. Y. 473; *Mason v. Lawing*, 10 Lea. 264." Willston, l. c. 326-328.—ED.

services rendered, if those services were worth much more for that time than the average for the year.

The contract is to be construed as a whole. It is not \$25 per month for a single month, or for each separate month, or for any number of months less than the year. The contract being entire, the defendants cannot break one part of it and still insist upon the performance of the other part. When the defendants rescinded the contract, they put it out of their power to enforce it upon the other party, but the other party may consider it as rescinded and claim pay just as though it had never existed, which will be just what he is claiming here, namely, to recover what his services were worth for the time he labored.

The error of the defendants' counsel in their brief is in assuming that here was payment made by the defendants and received by the plaintiff in full for the services of each month. The defendants cannot hold the plaintiff to the agreed price per month only in connection with the other part of the contract, viz., that the employment should continue at the same rate for the whole year. Where one party to a special contract, which is executory, refuses to execute any substantial part of his agreement, the other party may rescind, if he do so unequivocally and in reasonable time. *Webb v. Stone*, 24 N. H. 288; *Allen v. Webb*, 24 N. H. 278; *Weeks v. Robie*, 42 N. H. 316, and cases cited; *Danforth v. Dewey*, 3 N. N. 79; *Judge of Probate v. Stone*, 44 N. H. 593.

This contract was executory, in that it was to be continued for a year; and when the defendants broke it in this respect, they cannot hold the plaintiff bound by the other provisions of it. The plaintiff had the right to rescind the whole contract, and sue in *indebitatus assumpsit* to receive back a consideration paid, or on a *quantum meruit* to recover what his services were worth. This is the same form of action as in *Britton v. Turner*, 6 N. H. 481.

*Judgment on the verdict.*¹

¹In *Posner v. Seder* (1903) 184 Mass. 331, it was held that a person employed for one year to be paid in a certain sum each week under a contract requiring him to work overtime without extra pay not more than two hours in one day nor more than two months in the entire year, cannot, if wrongfully discharged before the end of the year, sue on a *quantum meruit* for the overtime work alone, although he can sue on such a count for the value of all his services, crediting the amount received as part payment. To quote the court at page 334:

"Upon *quantum meruit* the question is what are his whole services fairly worth, and is there anything fairly due him? Manifestly, under a contract like this, that may be an entirely different sum from the market value of the services during the extra hours. The case of *Clark v. Manchester*, 51 N. H. 594, is a good illustration of the principles applicable to a case like this."—ED.

STOWE v. BUTTRICK.

SUPREME COURT OF MASSACHUSETTS, 1878.

[125 *Massachusetts*, 449.]

CONTRACT upon an account annexed for services rendered as keeper of certain property attached by the defendant, a deputy sheriff. Answer: 1. A general denial; 2. That the contract was illegal and void.¹

LORD, J. The ruling of the presiding judge, that the contract which the plaintiff seeks to enforce is void because of illegality, cannot be sustained. *Cutter v. Howe*, 122 Mass. 541. Nor is the position of the defendant tenable that, inasmuch as he received no benefit from the services of the plaintiff, the plaintiff cannot recover. In an action upon a *quantum meruit* for services rendered to another upon his express request, the value of the services is not to be determined by the amount of the benefit which the party requesting them receives. If A hires B to perform a particular service in a particular mode, the compensation is to be determined by the value of the services, and not by the benefit which A derives from it.²

Exceptions sustained.

THE WELLSTON COAL CO. v. THE FRANKLIN PAPER CO.

SUPREME COURT OF OHIO, 1897.

[57 *Ohio State*, 182.]

MINSHALL, J. The action below was brought by the Wellston Coal Company to recover of the Franklin Paper Company \$333, the difference between the contract price for certain coal delivered by the plaintiff under a contract claimed to have been wrongfully broken by the defendant, and the market price at the time of the deliveries, with interest. The action is not on the contract, but on what, at common law, would be termed a count in general *assumpsit* on a *quantum valebat*.

The facts, about which there is no dispute, are correctly stated in the brief of the plaintiff.

On August 7, 1890, plaintiff and defendant made a written contract by which defendant for the term of one year, agreed to take its entire supply of coal from plaintiff at the rate of \$1.90 per ton of

¹The statement of facts and part of the opinion are omitted.—Ed.

²And see *Planché v. Colburn* (1831) 8 Bing. 14; *Prickett v. Badger* (1856) 1 C. B. N. S. 295; *Ralston v. Kohe* (1876) 30 Oh. St. 92.—Ed.

2,000 pounds on the cars at Franklin, Ohio, which after deducting freight, would net the plaintiff \$1.00 per ton.

The demand for such coal was greater during the late fall and winter months of each year, when plaintiff's business would be active, and less during the spring and summer months, at which times its business would be dull. The sum of \$1.00 per ton for the coal was the market price, outside of freight charges, for coal of the kind mentioned in the contract, during the summer of 1890, and at the time the contract was made. Plaintiff and defendant were familiar with the ups and downs of the coal trade, and knew that the market price of such coal would be higher during the fall and winter months; and they both understood that defendant would require for its manufacturing operations during the entire period covered by the contract, a large amount of such coal, which taken by defendant during all the year covered by the contract, would give plaintiff an assured sale for that amount of coal during the dull season. Such contracts for the year's supply of coal were usually made by manufacturers with coal shippers during the summer; and were advantageous to both parties.

These facts were known to both plaintiff and defendant, who contracted with reference to them; and plaintiff would not have made the contract whereby it agreed to supply coal during the fall and winter months at the contract price, which would be less than the market prices, except for the fact that it would supply the defendant coal at the same price for the balance of the year, when the price would be about the same as the contract price, and the demand then being small, it would not otherwise be able to sell the coal.

During the month of September, 1890, the market price of this coal, outside of freight charges, was \$1.05 per ton, and from October 1, 1890, to February 1, 1891, such market price was \$1.15 per ton. After February, during the rest of the year covered by the contract, the market price was the same as the contract price. During the period of time from August 1, 1890, to May 13, 1891, when the contract was broken by the defendant, plaintiff furnished defendant, during September and October, 1890, in all, 2,562½ tons of coal, for which it was paid the contract price; while, if the same coal had been sold at the market prices when delivered, plaintiff would have received \$333 more for it.

About May 13, 1891, defendant wrongfully broke the contract, and refused to take any more coal from plaintiff. The contract did not bind the defendant to take any specified quantity of coal per month, but the average number of tons per month, taken before the contract was broken, was four hundred and thirty-four and one-fourth tons; and if it had continued to take coal under the contract at the same average number of tons for the balance of May and the months, June and July, the plaintiff would have made a total profit for that time under the contract, of \$304.22.

The question is as to the measure of damages to which the plaintiff is entitled in a case like this. It, as before stated, is not on the contract, but for the value of the coal delivered at the market price, before the contract was wrongfully terminated by the defendant, less what had been paid therefor, *i. e.*, the contract price. The plaintiff requested the court to charge the jury that it was entitled to recover for the coal delivered prior to the repudiation of the contract by the defendant, its market value when the deliveries were made, and is not limited to the price specified in the contract. This the court refused to do, and directed the jury to find a verdict for the plaintiff for nominal damages only.

The general rule is, that when full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages, or he may disregard the contract and sue as upon a *quantum meruit* for what he has performed. The plaintiff has pursued the latter course; and it seems well settled, both on reason and authority, that he had the right to do so. 2 Sedgwick on Damages, 8th ed. 654; Chamberlain v. Scott, 33 Vt. 80; McCullough v. Baker, 47 Mo. 401; Kearney v. Doyle, 22 Mich. 294; Buffkin v. Baird, 73 N. C. 283; U. S. v. Behan, 110 U. S. 338; Merritt v. Railroad, 16 Wend. 586; Clark v. Mayor of N. Y., 4 Con. 338.

But it is claimed on the authority of Doolittle v. McCullough, 12 Ohio St. 360, that the contract price must still be the measure of the plaintiff's recovery. There are many expressions in the opinion in that case that seem to support this view, and much of the reasoning is to the same effect. But all that is there said must be taken as said with reference to the facts of that case. The rule there stated may be regarded as a proper one in a case where, as in that case, it appears from the claim of the plaintiff, that the breach of the contract by the defendant worked no loss, but a benefit to him, on the ground, as appears, that had he been required to complete the work, he would have suffered a much greater loss; for, if the least inexpensive part of the work could not have been done without loss, it follows that the doing of the remaining part, under the contract, would have resulted in a still greater loss. The action upon a *quantum meruit* is of equitable origin, and is still governed by considerations of natural justice. Hence, where one has performed labor or furnished material under a contract that is wrongfully terminated by the other party before completion, the question arises whether the party, not in fault, should be confined to the contract for what he did, or to a *quantum meruit*; and this must depend upon whether the act of the other party in terminating the contract, works a loss or not to him, regard being had to the contract. If it works no loss, but is in fact a benefit, as in the case of Doolittle v. McCullough, there are no considerations of justice requiring that he should be compensated in a greater sum for what he did than is stipulated in the contract. These considerations exercised a

controlling influence in the case just referred to. The plaintiff had a contract with the defendant for the making of certain excavations in the construction of a railroad. He was to receive for the entire work eleven cents per cubic yard. He had performed the least inexpensive part of the work, when the contract was wrongfully terminated by the defendant, and on this part, by his own showing, he had suffered a loss. The proof showed that the performance of the remainder, being hard-pan, would have cost him a great deal more. It was then evident, as the court observed, that he had sustained no loss, but a benefit, from the termination of the contract by the defendant. But in the case before us the facts are very different. They are in fact just the reverse. The contract was for the delivery of coal at a price generally received during the dullest season of the whole year. The defendant received the coal during the season when the market was above the contract price. He had the benefit of the difference between the market and the contract price; but when the dull season arrived and the advantages of the contract would accrue to the plaintiff, the defendant repudiated it. The difference between the two cases is thus apparent. In the case before us, justice and fair dealing require that the defendant having repudiated the contract, should pay the market price for the coal at the time it was delivered; in the former case, as the repudiation of the contract by the defendant did not enrich him to the loss of the plaintiff, there were no considerations of justice on which the plaintiff could claim more than the contract price for what he had done under the contract.

The object in allowing a recovery of this kind is not to better the condition of the plaintiff under the contract, were it performed, but to save him from a loss resulting from its wrongful termination by the defendant; or, in more general words, to prevent the defendant from enriching himself at the expense of the plaintiff by his own wrongful act. The real test in all cases of a plaintiff's right to recover as upon a *quantum meruit* for part performance of a contract, wrongfully terminated by the defendant, depends upon the consideration whether the defendant is thereby enriched at the loss and expense of the plaintiff; if so, then the law adds a legal to the moral obligation, and enforces it. Keener, *Quasi Contracts*, 19; and ch. V. *passim*. And while the action is not on the contract itself, yet it is so far kept in view as to preclude a recovery by the plaintiff where he would necessarily have lost more by performing the contract, for the consideration agreed upon, than he did by being prevented from doing so.

In this view the case of *Doolittle v. McCullough* was rightly decided, and, when limited to its facts, may well stand as authority in all similar cases.

*Judgment of the circuit court and that of the common pleas reversed, and cause remanded for a new trial.*¹

¹"If the performance rendered consists of services, there cannot ordinarily, from the nature of legal remedies, be actual restitution, but it is possible to

BROWN v. WOODBURY & ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1903.

[183 *Massachusetts*, 279.]

CONTRACT for an alleged breach of an oral contract to employ the plaintiff as manager of the hotel Westminster in Boston, from September 1, 1900, through August 31, 1901, with a second count on a *quantum meruit* for services as manager from September 1, 1900, to May 13, 1901. Writ dated June 3, 1901.

HAMMOND, J. 1. The declaration contained two counts, the first based upon an affirmance of the contract, the second upon a disaffirmance of it. At the close of the evidence the defendants asked for a ruling that the plaintiff not having waived the first count, but having relied on it throughout the trial, could not recover upon the second count, but could recover, if at all, only upon the first, and further that the plaintiff at that stage of the case could not elect to waive the first count and to rely only upon the second. The judge refused thus to rule, but having ruled that the plaintiff could not go to the jury on both counts, allowed him to strike out the first and to press his case on the second. The ruling was correct. *Mullaly v. Austin*, 97 Mass. 30, 33, *ad finem*. *Whiteside v. Brawley*, 152 Mass. 133, and cases cited. See also *National Granite Bank v. Tyndale*, 179 Mass. 390. *Linningdale v. Livingston*, 10 Johns. 36.

give the equivalent in value under a common count. Since money paid may be thus recovered back, and similarly in this country land, logic would require such a remedy; and it is allowed in part, but only in part. If the plaintiff has fully performed, the only redress he has for breach of contract by the other side is damages for the breach. It is true that if the performance to which he is entitled in return is a liquidated sum of money, he may sue in *indebitatus assumpsit* and not on the special contract; Keener, *Quasi-Contracts*, 300; Leake, *Contracts* (3d ed.), 45; Chitty, *Pleadings* (7th ed.), i. 358; *Atkinson v. Bell*, 8 B. & C. 277, 283; *Grandall v. Pontigny*, 1 Stark. 198; *Savage v. Canning, Jr.* 1 C. L. 434; *Wardrop v. Dublin, etc., Co., Jr.* 8 C. L. 295; *Shepard v. Mills*, 173 Ill. 223; *Southern Bldg. Ass'n v. Price*, 88 Md. 155; *Nicol v. Fitch*, 115 Mich. 15; but the measure of damages is what he ought to have received—not the value of what he has given, Keener, *Quasi-Contracts*, 301; Leake, *Contracts* (3d ed.), 45; *Barnett v. Sweringen*, 77 Mo. App. 64, 71, and cases cited; *Porter v. Dunn*, 61 Hun. 310 (S. C. 131 N. Y. 314). If, however, the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover, either in England or America, the value of what he has given. *Mayor v. Pyne*, 3 Bing. 285; *Planché v. Colburn*, 8 Bing. 14; *Clay v. Yates*, 1 H. & N. 73; *Bartholomew v. Markwick*, 15 C. B. (N. S.) 711; *McConnell v. Kilgallen*, 2 L. R. Ir. 119. But the right was denied as re-

2. The instructions to the jury were also correct. Under these instructions the jury must have found that the special contract of employment was terminated by the defendants by the discharge of the plaintiff without cause and against his will, whereby it was impossible for the plaintiff to perform the agreement on his part. The defendants not only broke the contract on their part, but they made it impossible for the plaintiff to perform his part. In such a case the innocent party may either sue upon the contract for damages for the breach, or, if he so elects, he may regard the action of the defendants as indicating a purpose on their part to repudiate the contract, may accept the repudiation, and recover upon a *quantum meruit* the value of his services, as if the special contract had not existed. For cases where this last rule has been applied in England, see *Planché v. Colburn*, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; and the authorities cited in the note to *Cutter v. Powell*, 2 Smith Lead. Cas. (9th Am. ed.) 1212, 1245, *et seq.*

Although in this country there appears to be a conflict on this question among the authorities, (see *Derby v. Johnson*, 21 Vt. 17, and *Doolittle v. McCullough*, 12 Ohio St. 360,) still, in this State the matter seems to have been covered by our previous decisions, in which the English rule is recognized and followed. *Fitzgerald v. Allen*, 128 Mass. 232. *Cook v. Gray*, 133 Mass. 106, 111. *Connolly v. Sullivan*, 173 Mass. 1.

The defendants further contend that the plaintiff, having received the benefit of the board of his father and mother for several months, cannot now avail himself of this rule. But this board was in part

cently as 1802 in *Hulle v. Heightman*, 2 East. 145, though such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy, in an action on the contract for damages. In some jurisdictions, if a price is fixed by the contract, that is made the conclusive test of the value of the services rendered. *Chicago v. Sexton*, 115 Ill. 230; *Keeler v. Clifford*, 165 Ill. 544, 548; *Chicago Training School v. Davies*, 64 Ill. App. 503; *Western v. Sharp*, 14 B. Mon. 177; *Doolittle v. McCullough*, 12 Ohio St. 360 (much qualified by *Wellston Coal Co. v. Franklin Paper Co.* 57 Ohio St. 182); *Harlow v. Beaver Falls Borough*, 188 Pa. 263, 266; *Noyes v. Pugin*, 2 Wash. 653. More frequently, however, the plaintiff is allowed to recover the real value of the services though in excess of the contract price. *United States v. Behan*, 110 U. S. 338, 345; *Clover v. Gottlieb*, 50 La. Ann. 568; *Rodemer v. Hazlehurst*, 9 Gill, 288; *Fitzgerald v. Allen*, 128 Mass. 232; *Kearney v. Doyle*, 22 Mich. 294; *Hemminger v. Western Assurance Co.* 95 Mich. 355; *McCullough v. Baker*, 47 Mo. 401; *Ehrlich v. Aetna L. I. Co.* 88 Mo. 249, 257; *Clark v. Manchester*, 51 N. H. 594; *Clark v. Mayor*, 4 N. Y. 338; *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80. The latter rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible.” Williston, l. c., 320, 321.—*Ed.*

payment of the work done by the plaintiff, and whether the action be upon the contract or on *quantum meruit*, the plaintiff is equally entitled to it. Part payment in money would not bar the plaintiff from the action on *quantum meruit*, *Cook v. Gray* and *Connolly v. Sullivan*, *ubi supra*, and in principle part payment in board can have no different effect. In the opinion of a majority of the court the rulings were right.

Exceptions overruled.

(b) *The Plaintiff is in Default.*

OXENDALE v. WETHERELL.

KING'S BENCH, 1829.

[7 *Law Journal*, 264.¹]

THIS was an action of assumpsit, for wheat and other corn, goods, wares and merchandizes, sold and delivered. The following appear to be the principal facts of the case, which was tried before Mr. Justice BAYLEY, at the Spring Assizes for the county of York, 1829.

The action was brought to recover the price of one hundred and thirty bushels of wheat, alleged to have been sold and delivered by the plaintiff to the defendant, at 8s. per bushel. On the part of the plaintiff, evidence was given to show, that, on the 17th of September, 1828, he had sold to the defendant all the old wheat which he had to spare, at 8s. per bushel; and that he had delivered to the defendant one hundred and thirty bushels. The defendant gave evidence to shew, that he had made an absolute contract for two hundred and fifty bushels, to be delivered within six weeks; that the price of corn at the time of the contract, was 8s. per bushel; and that it afterwards rose to 10s. On his part, it was insisted, that, the contract being entire, the plaintiff, not having delivered more than one hundred and thirty bushels, had not performed his part of the contract, and therefore could not recover for that quantity. It was contended by the other side, that the vendor having delivered, and the vendee having retained part, the contract was severed *pro tanto*, and that the plaintiff was entitled to recover the value. The learned Judge was of opinion, that, even if the contract was entire, as the defendant had not returned the one hundred and thirty bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the one hundred and thirty bushels, which had been delivered to, and accepted by the defendant; but he desired the jury to say, whether the contract for two

¹This case is also reported in 9 B. & C. 386.—Ed.

hundred and fifty bushels was entire, and that only one hundred and thirty bushels had been delivered; and they found that it was. A verdict was therefore taken for the plaintiff; and the defendant had liberty to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract; and now—

Mr. *Brougham* moved for a nonsuit. In the case of *Walker v. Dixon*, 2 Starkie, 281, the plaintiff having contracted for the sale of one hundred sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; Lord ELLENBOROUGH held, that the plaintiff could not recover for the part delivered; and nonsuited him.

[Mr. Justice BAYLEY. There was a case of *Waddington v. Oliver*, 2 New Rep. 61, on this subject. The Court there appeared to think, that, after the expiration of the time, the plaintiff might recover for what he had delivered.]

It became unnecessary for the Court to decide that point, as the action was brought before the time had expired. But the Court there expressly said, that the contract was entire.—The defendant might sustain an action against the plaintiff for his breach of contract; and, according to *Templer v. M'Laehlan*, 2 Id. 136, and that class of cases, it seems doubtful, whether the party who himself breaks the contract can sue upon it. The declaration, in its present form, is the same as would be adopted if the plaintiff had fully performed his contract.

Lord TENTERDEN. I think, in this case, no rule should be granted. With regard to the case of *Walker v. Dixon*, which has been cited to us as an authority in favour of the defendant, it appears by Mr. Manning's Digest, p. 389, that, in that case, the Court afterwards set aside the nonsuit. If the rule, which has been contended for, were to prevail, it really must follow, that, if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole. The defendant ought to pay for what he has had; and bring an action against the plaintiff for the non-performance of his contract in not delivering the whole.

Mr. Justice BAYLEY concurred.¹

Mr. Justice PARKE. I am of the same opinion. The case which has been referred to, of *Waddington v. Oliver*, proceeds upon the known distinction, which I take to be this: where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before

¹In the report of this case in 9 B. & C. 386, 387, Mr. Justice BAYLEY is reported to have said: "The defendant, having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same."—ED.

the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered; but, if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered. Thus, if the contract is to deliver three articles, and the seller sends but one, the buyer may, if he please, refuse to receive it: but, if he receive it, he must pay for it, though the contract to deliver the three be not performed. For the breach of that contract he must resort to his action.

Mr. Justice LITLEDALE concurred.¹

CHAMPLIN *v.* ROWLEY.

COURT FOR THE CORRECTION OF ERRORS OF NEW YORK, 1837.

[18 *Wendell*, 187.]

ERROR from the Supreme Court. Champlin sued Rowley in an action of assumpsit, and declared on the common counts for goods and chattels and hay sold and delivered. On the trial of the cause it appeared that on 12th September, 1831, a contract was entered into by the parties, whereby the plaintiff agreed to deliver to the defendant, at a certain dock in Rhinebeck in Dutchess county, 100 tons of hay, and as much more beyond that quantity as he had to spare, to be delivered pressed, between the day of the date of the contract and the last run of the sloops navigating the river; for which the defendant agreed to pay at the rate of three shillings and sixpence per cwt.—\$100 to be paid in advance, and the residue when the whole quantity should be delivered. The defendant paid the \$100 advance. The plaintiff commenced the delivery of hay on 25th October, 1831, and delivered more or less every week until the river closed on the 9th December, when the whole quantity of hay delivered amounted only to 52 tons and 900 wt. The ordinary time of the closing of the river at Rhinebeck is from 20th to 30th December. The defendant, in pursuance of a notice attached to his plea, offered to prove, that after the making of the contract the price of hay rose in the market to eight shillings, and from that to ten shillings per cwt., and that had the plaintiff performed his contract, the net profits which the defendant would have made upon the hay undelivered would have exceeded the sum claimed by the plaintiff for the quantity delivered; and he fur-

¹See further on the subject of entire contract: *Sinclair v. Bowles*, 9 B. & C. 92; 7 Law Journ. K. B. 178; *Poulton v. Lattimore*, 9 B. & C. 259; 7 Law Journ. K. B. 225.—REP.

See *Shipton v. Casson* (1826) 5 B. & C. 378.

ther offered to prove that he hired a storehouse in the city of New York for the reception of the hay, at a rent of \$90, which he had been obliged to pay, and in consequence of the non-performance of the contract by the plaintiff, the storehouse had been unoccupied and of no use to him: which evidence was objected to by the plaintiff and rejected by the judge. The defendant insisted that the plaintiff was not entitled to recover, 1. because he had failed in performance of the contract on his part; and 2. that at all events he could not recover under the common counts. The judge ruled that the defendant having received a partial benefit, the action lay without showing a full performance on the part of the plaintiff, and that a recovery might be had under the common counts; and he accordingly directed the jury that the plaintiff was entitled to their verdict for the value of the hay delivered at the contract price, deducting the \$100 paid, with the interest of the balance from 9th December, when the river closed. The jury found a verdict for the plaintiff for \$386.64. The defendant made a case and applied to the Supreme Court for a new trial, which was granted. See opinion of court, 13 Wendell, 260. On the application of the plaintiff, to enable him to sue out a writ of error, the rule granting a new trial was vacated and judgment was entered for the defendant. The case was then, by agreement of the parties, turned into a special verdict, by which the jury were represented to find the contract as above stated, the payment of the advance of \$100, the delivery of the 52 tons and 900 wt., and the closing of the navigation on the 9th December. The jury were also represented to find "that after the making of the contract and in the course of the ensuing winter the price of hay rose in the market to eight shillings, and from that sum to ten shillings per cwt.;" and the hiring of the store in New York, and the consequent loss to the defendant, were also set forth. A record being made up incorporating the special verdict, and rendering judgment thereon for the defendant, the plaintiff sued out a writ of error, removing the record into this court.

After advisement, the following opinion was delivered.

By the Chancellor [WALWORTH]. This is an action to recover compensation for the value of hay delivered in part performance of a contract to deliver a larger quantity, and to be paid for when the whole was delivered. From the facts stated in the special verdict there is no doubt that the non-performance of the contract in full has never been waived by any act of the defendant; and it is also very probable from the facts stated in the special verdict that he must have sustained considerable damage by the non-delivery of the residue of the hay according to the contract. It is not found by the verdict that the plaintiff offered to deliver the residue of the hay after the time specified in the agreement, or that he ever requested the defendant to return the hay which had been actually delivered. Neither was that necessary, if some of the recent cases in England on this subject can be considered

as law in this State. In *Oxendale v. Witherall*, 9 B. & C. 386, it was held that the party who had failed to perform his contract could recover against the other, who had not been in fault, for the wheat delivered in part performance of his agreement, unless the defendant had returned the wheat delivered. This decision, carried to the extent it was in that case, cannot be considered as good law anywhere; for it is not founded upon any equitable principle, and is contrary not only to justice, but also to common sense. The only way I can account for it is upon the supposition that the facts of the case are not properly stated in the report; or that the injustice of requiring the party who was not in fault to be at the expense of returning to the other party bulky articles of this description, or even of seeking him for the purpose of making an offer to return them to protect himself from an action, was not presented to the consideration of the court. Again: in that case, as in this, the contract was not to deliver the whole quantity at one time, but to deliver the whole within a certain specified period. Neither was there any agreement, either express or implied, that the defendant should not be permitted to sell or use the several parcels, delivered from time to time, until the latest period for completing the contract had actually expired. Here the contract was to deliver a large quantity of pressed hay upon the dock at Rhinebeck, between the twelfth of September and the closing of the navigation on the river; from which it is fairly to be inferred that it was understood by both parties that it was to be transported from thence to the market where such an article as pressed hay was used, by water, and while the river remained open. The plaintiff, therefore, was not bound to take all the hay to the dock at once; but the defendant, by his contract, was bound to receive it in reasonable parcels, as it was brought to the place appointed for the delivery within the time specified. *Lewis v. Weldon*, 3 Rand, 71. Neither is it the sensible construction of this agreement that the defendant was to keep the fifty-two tons of hay on hand at Rhinebeck dock, until after the navigation closed, for the purpose of seeing whether the other party intended to perform his agreement as to the delivery of the residue. The idea of founding an action upon the neglect of the defendant to return the hay delivered in such a case, therefore, is not founded in good sense. And I confess I can see no ground for the distinction which has been established by the English cases, since the Revolution, between the part performance of a contract for labor and a partial performance of a contract for the delivery of specific articles under such an agreement as this. If the fifty-two tons of hay delivered under this contract were in New York at the time the navigation closed, as it may fairly be presumed they were, if the defendant had paid a reasonable attention to his own interest, or if the wheat in the case of *Oxendale v. Witherall* had been sold or converted into flour before the failure of the plaintiff to perform the residue of his contract, it would be about as unreasonable to

require the defendant to return the hay to the plaintiff as it would be to return the fruits of the labor of a man who had neglected to perform his contract for labor in full.

If any action can be sustained, in such a case, by the party who has failed to perform his contract, without any fault or acquiescence or waiver of a strict performance by the party who has received the benefit of the part performance, it must be upon the equitable principle recognized by the Supreme Court of New Hampshire in *Britton v. Turner*, 6 N. H. 492. The principle adopted in the case referred to is, that it is unconscientious and inequitable for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained by the non-performance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor; and that this excess of benefit arising from the part performance of the other party, forms a new consideration upon which the law implies a promise to pay for the same, and which excess of benefit, therefore, may be recovered in the equitable action of *assumpsit*. But if the nature of the part performance is such that the other party can reject the benefit received therefrom, as by offering to return specific articles received in part performance, but not actually converted or used, he is at liberty to do so, and to reserve his remedy for the non-performance of the contract. Courts of equity sometimes act upon a similar principle in relieving a party against a penalty or forfeiture arising from misfortune or the neglect of a party to perform his agreement; and perhaps in some cases it has been done where the forfeiture was incurred wilfully and intentionally, without any pretence of excuse arising from mistake or inability to perform. With the exception of this last class of cases, if courts of justice were at liberty to make new laws instead of administering those which are already in existence, and upon which the contract of the parties litigant are supposed to be founded, or if this was a new question upon which a court in this State was now to pass for the first time in settling a principle upon the flexibility of the common law as applied to new cases, I see no reasonable objection to the transferring these principles of the court of chancery to courts of common law, in cases of mere personal contracts, not founded upon agreements relative to the sale or transfer of an interest in real estate. But I consider this question as settled in this State, by a uniform course of decisions for the last twenty-five years, during which time the laws have undergone a most thorough revision by the legislature, without any attempt to change the law in this respect, as settled by the Supreme Court. I think it belongs, therefore, to the legislature, and not to this court, to make a change in the law in this respect, if such a change is deemed to be expedient and useful to the community. The only possible objection I can perceive to such a change is, that it may be a strong temptation to negligence in the performance of personal con-

tracts, as the known practice of the court of chancery unquestionably is with respect to agreements for the sale or purchase of real property. The conclusion at which I have arrived on the question as to the plaintiff's right to recover at all in such a case, which was the principal question before the Supreme Court, entitles the defendant to a judgment upon this special verdict, upon the facts found thereby.

If the majority of the court agree with me in the conclusion at which I have arrived upon the first point, the judgment should be affirmed; but if they agree with me upon the last point, and not upon the first, the writ of error should be dismissed; so that the plaintiff in error may seek his remedy, if he has any, by an application to the Supreme Court.

For the reasons before stated, I must vote for an affirmance of the judgment.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows:—

In the affirmative: Senators BECKWITH, J. P. JONES, LOOMIS, PAIGE, SPRAKER, TALLMADE, WAGER, WILLES, WORKS—9.

In the negative: The PRESIDENT of the Senate, The CHANCELLOR, and Senators ARMSTRONG, J. BEARDSLEY, L. BEARDSLEY, DOWNING, EDWARDS, FOX, JOHNSON, H. F. JONES, LACY, MCLEAN, POWERS, STERLING, TRACY, VAN DYCK—16.

Whereupon the judgment of the Supreme Court was affirmed.¹

HELM v. WILSON.

SUPREME COURT OF MISSOURI, 1835.

[4 *Missouri*, 41.²]

IN appeal.

MCGIRK, Judge, delivered the opinion of the court.

Wilson brought an action of assumpsit on a special agreement; the first count goes for an agreement by which Wilson agreed to dig a ditch and tail race for a mill, the race was to be of a certain description. Helm was to do certain things on his part to enable the plaintiff to proceed. Then there is a count on the quantum meruit—issue non assumpsit. There was proof of the special agreement; there

¹Accord: *Catlin v. Thomas* (1863) 26 N. Y. 217; same case in 84 Am. Dec. 183 and note, 188. See, also, notes (with collection of authorities) to the following cases: *Oakley v. Morton* (1854) 11 N. Y. 25; 62 Am. Dec. 49; *Leonard v. Dyer* 1857) 26 Conn. 172; 68 Am. Dec. 382; *Doster v. Brown* (1858) 25 Ga. 24; 71 Am. Dec. 153; *Smith v. Brady* (1858) 17 N. Y. 173; 72 Am. Dec. 442; *Dula v. Cowles* (1859) 7 Jones' Law (N. C.) 290; 75 Am. Dec. 463.—ED.

²The principal case is also reported in 28 Am. Dec. 336, and see note 341.—ED.

was also proof, though somewhat conflicting, that some of the work, that is the tail race, was done according to contract. There was evidence to shew that some work had been done on the head race; but not enough to effect the object had in view by the contract. How deep this race should have been seems to depend on the fact of raising certain dams along the embankments so as to carry the water from the springs to a still house, which Helm was to make and keep the water following on behind the ditcher, so that he would be constantly informed when the race was deep enough. This Helm failed and refused to do. Whether Wilson dug all he could without running the risk of digging too much, does not appear to be settled by the testimony. There is as to this point conflicting testimony.

When the evidence was closed on both sides the plaintiff's counsel prayed the court to instruct the jury.

1st. That if they find from the evidence that Wilson made a contract as stated in either of the special counts, and has performed it, they will find for him.

2nd. That if they find from the evidence that there was no contract, but, the work was done at the request of the defendant, then under the general count they must find for the plaintiff.

3rd. That if the jury find that there was a special contract, and Wilson performed work under that contract different from the work to be done, then they will find for the plaintiff on the general count, for work and labour. Which instructions were given.

The defendant's counsel then asked the court to instruct the jury.—That if they found the agreement, and that the plaintiff had not performed all he could have performed, they must find for the defendant.

2nd. The second is the same in substance as the first.

3rd. That if the work proved was done under a special agreement, but not according to it, then they must find for the defendant unless the defendant prevented the execution of the special agreement.

These instructions were refused. There was a verdict for the plaintiff, and judgment thereon, to reverse which the defendant brings his cause to this court by appeal.

In the argument of the cause only one point was made, which is, that where a special agreement exists, and the plaintiff proves a part execution of the work, and then the work ceases without the balance being done and a part only or the whole performed, but different from the agreement: in either case the party can recover for what the work is worth.

To prove the plaintiff can recover in such cases Mr. *Rees* for the appellee cites 1 Sel. N. P. by Wheaton, 58, note 23; Bul. N. P. 139; Strange, 638; 10 John R. 36; 1 Mo. R. 47; Labaum v. Hill & Kees; 1 Bos. & Pul. 354.

The case in Buller does support the proposition assumed by the

appellee's counsel. In page 139 Buller lays down the law thus. If a man declare on a special agreement and likewise upon a quantum meruit, and at the trial prove a special agreement but different from what is laid—he cannot recover on either count, not on the first because of the variance, nor on the second because there was a special agreement. But if he proved a special agreement and the work done, but not pursuant to such agreement, he shall recover on the quantum meruit, for otherwise he would not be able to recover at all, as if in a quantum meruit for work and labour, the plaintiff proved he had built a house for the defendant: though the defendant should afterwards prove there was a special agreement, about the building of it, viz.: That it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement. Yet the plaintiff would be allowed to recover upon the quantum meruit, otherwise he could not recover at all, though doubtless such proof would be proper to lessen the damages.

It is admitted by us that such has been holden to be law in some cases both in America and England since *Keeks* case cited by Justice BULLER in Buller's N. P. 139, decided at nisi prius Oxon. 1744.

We never have seen the cases reported anywhere. The case above cited from *Strange* cannot be now had, and the case of *Cooke v. Manstone, Bossanquet & Puller* is wrongly cited.

The case cited from *Lenningdale v. Livingston*, 10 John R. 38, is a case of this kind: the plaintiff agreed to furnish certain logs, to bore and lay them; he procured and brought the logs to the place and bored some; the defendant then refused to have the balance of the work done, took the logs and used them. The plaintiff was allowed in this case to recover on the General count for the reason that the defendant had prevented the execution of the special agreement. The court in that case advert to the doctrine as laid down in Buller, 139, and seem to admit that the law is correctly laid down there. In our opinion this case in *Johnson* was put on the correct ground, which is this, that where there is a special agreement and the plaintiff is prevented by the defendant from doing the work, then the plaintiff may recover the worth of the labour at least or he may recover for the whole as if performed. Such was the opinion of this court in the case of *Paulsil & Clendennin*, 3 vol. Mo. R. 230.

In the case of *Labaum v. Hill & Kees*, 1 vol. Mo. R. 47, this court did lay down the law to be, that when there was a special agreement declared on and proved though not performed according to the agreement, yet the plaintiff may recover for the work really done. We are of opinion that the law in this case was not well considered; in this case the court laid down the law to be that where there was a covenant to do work in a particular manner and at a particular time, that parole evidence might be given to prove the work done, and that

the plaintiff might recover on a quantum meruit, though the work may prove not to have been done according to the covenant.

This point was expressly decided by the court on the authority of the case put in Buller, 139, and also on the authority of the case in 10th John. R. 38. See page 47, 1 vol. Mo. R. So far as regards the case in 10th John. R. the court seems to recognize the authority of Keeks case in Buller, but expressly decide the case on the ground, that the defendant had put an end to the contract and prevented the plaintiff from proceeding to execute the agreement. The case of Labaum v. Hill & Kees as to this point has never been well received by the bar as we understand. In the case of Crump v. Meed, 3 vol. Mo. R. 235, this court decided that where there was a covenant to perform work the party could not abandon his covenant and go for work and labor on quantum meruit. It seems to us this case overrules the doctrine as laid down in Labaum's case. It is a matter of regret that the report of Keeks case cannot be had: if it were in truth such a case as Justice BULLER says it was, then we cannot see how it can be consistent with the law. BULLER says the case was that it undertook to build a house of a particular kind, and to do the work in a particular manner and at a particular time, he may recover for whatever the work is worth, though it should appear that the work was not done in the manner contracted for. Can this be the law? It seems to us it cannot be so. It is a general rule of law that a contract must be performed according to the terms of the agreement before the party can have any right of action. This rule however is subject to some qualifications—one is, that if the other party will prevent the execution of the agreement then the action will lie, and the plaintiff's right to recover is as complete as if the contract had been fully executed.

Another qualification is, that where the parties vary the original terms of the agreement by substituting something else, for the whole or for particular parts of the agreement, there the substituted things become a part of the agreement, and the parts dispensed with are no longer any part of the agreement. But then the substituted parts must be performed before any action can arise, and it is possible there may be cases where the act of God would excuse the performance so as to enable the plaintiff to recover for what he had done, where all was not done. The legislature cannot make a law impairing the obligation of a contract. The courts cannot do it, nor should they permit a party to do it, and yet, at the same time allow him to recover for the full value of his labor as if he had complied with his agreement. under the apology that though it is true he has utterly disregarded his agreement and has done work for the other party which was not agreed for, he must recover in general assumpsit or he cannot recover at all. Suppose he could not recover at all. What of that? It is better he never should recover, than that the defend-

ant should be compelled to pay for work he never contracted for: Suppose A. agrees to build a house for B. on the land of B. which he wishes to use as a store room for wholesale business, and the form and manner of the work is agreed on to that end. A. goes on to build the house only half as big as he was to make it, with only half the number of windows and doors, and those windows and doors only of half the size agreed for.

B. refuses to pay anything and is sued in general assumpsit for so much as the work is worth. The defendant proves on the trial that he bargained for a large house well lighted and to be of good workmanship, and the house built is totally unfit for the purpose; that the workmanship is inferior and almost useless. The law as laid down in *Buller* will make this reply to him: this plaintiff notwithstanding his special agreement to build for you a house fit for the business of a wholesale merchant, had a right instead thereof to build just such a house for you as he might please. If the house will not do for the purpose you wanted it for, yet it will answer for some other purpose and we will leave it to the jury to say how much such a house is worth as a blacksmith shop, a stable or dwelling house, and if they find the house built is good for any of those things, they will find how much the labor and materials are worth, and you must pay for the house according to such value. This doctrine is predicated on the idea that the plaintiff is entitled to the worth of his labor. without any regard to the rights of the other party. It will not be denied that it is a matter of great consequence that men who have means and money to employ labor should be at liberty to employ the same with a view to their own interests. This end is totally defeated if it be true that the other party has a right to substitute other labor as to kind and quality, and time too, to suit his own interests best, and compel the other party to pay therefor so much as it may be worth. But the argument is that if it is worth little or nothing, little or nothing will be allowed. Can it be right and lawful to compel the defendant to be taxed with the expenses and trouble of a lawsuit to shew that the work was worth little or nothing, and if the work was worth anything at all for any purpose, the defendant must pay for it, and the costs too, when the plaintiff's only merit is that he has worked and labored, but contrary to his agreement and contrary to the wish and interest of his employer. The law as laid down by *BULLER* in *Keeks* case has no reason in it as there stated.

It may in truth have been a better case than it seems to have been: it may have been that, as to the alteration of the form of the work it was proved that the defendant agreed to that; if that were so, then the substituted agreement would in truth be the agreement of the parties, and if that were proved then the plaintiff ought to recover if he has executed this new agreement with the remaining part of the old one.

We hold the law to be, that where there is a special agreement the party who is to execute it must do so before he can recover anything. And if there be subsequent modifications of the agreement so as to change the quantity, manner or quality of the work, then when this is proved, the modified agreement may be engrafted on the old bargain, so as to make a good agreement and may then when executed be recovered on. As to the mode of proof there is no more difficulty in this case than in any other. If a man be present while the work progresses and makes no objection to an alteration which is proved to have been seen and known by him, this may be some evidence that he agreed to the alteration. Subsequent use may sometimes be strong evidence and sometimes very weak. But let this matter be as it may, the proof lies on the plaintiff, and he must make it out, as he must in every other material case.

We are of opinion the court erred in the 2d and 3rd instruction given for the plaintiff. The judgment of the court below is reversed—the cause is remanded.¹

BLOOD v. WILSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1886.

[141 *Massachusetts*, 25.]

MORTON, C. J.² It is well settled in this commonwealth, that when a special contract has not been fully performed, but the plaintiff has in good faith done what he believed to be a compliance with the contract, and has thus rendered a benefit to the defendant, he can recover the value of his services not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the stipulations of the contract. *Hayward v. Leonard*, 7 Pick. 181; *Reed v. Scituate*, 7 Allen, 141; *Atkins v. Barnstable*, 97 Mass. 428; *Denham v. Bryant*, 139 Mass. 110.

The instructions at the trial, to which the defendant excepted, were in compliance with this rule, and were correct.

*Exceptions overruled.*³

¹Notwithstanding the passage quoted in the principal case from Buller's *Nisi Prius*, 139a, the English courts have consistently refused to follow the reasonable doctrine to which BULLER lent the weight of his great authority. See *Ellis v. Hamlen* (1810) 3 Truitt, 52 per Sir James MANSFIELD, C. J. (not to be confused with the illustrious Earl of that name); *Munro v. Butt*. (1858) 8 E. & B. 738.

²The statement of the case is omitted.—Ed.

³For further authorities on the measure of recovery in Massachusetts, see *Hayward v. Leonard* (1828) 7 Pick. 181, 187 S. C. 19 Am. Dec. 268, and note, 272-282; *Angus v. Scully* (1900) 176 Mass. 357; *Gillis v. Cabe* (1901) 177 Mass. 584.—Ed.

PINCHES v. THE SWEDISH EVANGELICAL LUTHERAN CHURCH.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1887.

[55 *Connecticut*, 183.]

ACTION to recover for work done and materials furnished in erecting a church edifice for the defendants; brought to the Superior Court in Hartford County, and tried to the court before TORRANCE, J. Facts found and judgment rendered for the plaintiff, and appeal by the defendants. The case is fully stated in the opinion.

BEARDSLEY, J. The plaintiff claims to recover upon the counts for work and materials furnished in the erection of a church edifice for the defendants. A written contract was entered into by the parties, providing that the plaintiff should erect the edifice upon the land of the defendants, in accordance with certain plans and specifications. The plaintiff completed the building on the 21st day of January, 1885, when the defendants entered into the full possession and occupancy of the same. The building varies from the requirements of the contract in several material particulars.

The ceiling is two feet lower, the windows are shorter and narrower, and the seats are narrower than the specifications require, and there are some other variations and omissions. The defect in the height of the ceiling is due to the combined error of the plaintiff and the defendant's architect.

The other changes and omissions occurred through the inadvertence of the plaintiff and his workmen. The defendants knew of the change in the height of the ceiling when they took possession of the building, and of the changes in the windows and seats shortly afterwards, and objected to the changes as soon as they discovered them.

The plaintiff, in doing the work and furnishing the materials, acted in good faith, and the building as completed is reasonably adapted to the wants and requirements of the defendants, and its use is beneficial to them.

It would be practically impossible to make the building conform to the contract without taking it partially down and rebuilding it. The defendants, upon the trial of the case, offered evidence to prove the amount it would cost to make the building conform to the contract, claiming that they were entitled to such sum as damages. The court excluded the evidence, and the only error assigned is the exclusion of that evidence. The defendants' claim rests upon the assumption that the liability of the plaintiff to damages is not affected by the fact that his deviation from the contract was unintentional, nor by the advantageous use of the building, but that it is the same as it would

have been if he had wilfully departed from the contract, and they had rejected the building and received no benefit from it.

The defendants' claim is undoubtedly supported by decisions of courts of eminent authority in England and this country, which hold that no recovery can be had for labor or materials furnished under special contract, unless the contract has been performed, or its performance has been dispensed with by the other party.

The hardship of this rule upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification; and the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not wilful, and the other party has availed himself of, and been benefited by, such labor and materials; and as a general rule the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work. *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Cong. Meeting House*, 8 Pick. 178; *Moulton v. McOwen*, 103 Mass. 591; *Kelly v. Town of Bradford*, 33 Verm. 35; *Corwin v. Wallace*, 17 Iowa, 374; *White v. Oliver*, 36 Maine, 92; *Dermott v. Jones*, 23 Howard, 220; *Smith v. School District*, 20 Conn., 312; *Blakeslee v. Holt*, 42 Conn., 226; *Lucas v. Gadwin*, 3 Bingham, N. C. 737; *Chitty on Contracts*, 569; 2 Greenl. Ev., § 104; 2 *Parsons on Contracts*, 523, and note *i*.

In cases where only some additions to the work are required to finish it according to the contract, or where, as in the case of *Blakeslee v. Holt*, the defects in it may be remedied at a reasonable expense, it seems proper to deduct from the contract price the sum which it would cost to complete it, as was done in that case.

In the present case the result of the plaintiff's labor and materials is a structure adapted to the purpose for which it was built, and of which the defendants are in the use and enjoyment, but which cannot be made to conform to the special contract, except by an expenditure which would probably deprive the plaintiff of any compensation for his labor.

We think that the court below properly deducted from the contract price the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract.

There is no error.

In this opinion PARK, C. J., and CARPENTER, J., concurred; PARDEE and LOOMIS, JJ., dissented.

ANONYMOUS.

MICHAELMAS COMMON PLEAS, 1470.

[*Year Book* 49 *Hen. VI.*, folio 18, *placitum*, 22.]

DEBT brought by a priest, for that he was retained with the defendant to sing for the soul of one C for a year for ten marks. The defendant said (in reply) that within the year the plaintiff departed from his service. Whereupon for the plaintiff it was argued that the defendant must show at what time the plaintiff departed from his service, and pay for the time that he was in his service; and if the plaintiff served him for half a year, he should have five marks; etc.

CHOKE, J. This duty is entire, and he must serve him for a year, or otherwise he shall not have his salary; and he cannot demand it until he has served him.¹

M'MILLAN v. VANDERLIP.

SUPREME COURT OF NEW YORK, 1815.

[12 *Johnson*, 165.²]

IN error, on *certiorari*, from a Justice's Court. *Vanderlip* sued *J.* and *A. M'Millan*, by summons, before a justice, in an action on the case. He declared, stating his demand, *September* 26, 1812, to be for "spinning 845 runs of yarn, at 3 pence *per* run; for damage for not finding a sizable jenny, 10 dollars; for damage for not finding a sufficient instructor, 10 dollars; for damage for spinning bad roving, 10 dollars; for damage for time lost, for want of roving, 5 dollars."

The defendant pleaded the general issue, and there was a trial by jury.

The plaintiff proved that he had worked for the defendants below, 11 or 13 weeks; and the witness stated, that the plaintiff said he was to work one year, to spin at three cents per run; but should not make wages, the roving was so bad. Another witness said he understood from the defendants, that the plaintiff had agreed to work with the defendants, 10½ months, at 3 cents per run; and an account was produced, dated *September* 1, 1812, in which the defendants charged the plaintiff three dollars, paid to him; and credited him with spinning 845 runs of yarn. One of the witnesses said he was to have 5 cents a

¹The principal case is somewhat freely translated and abridged so as to bring out the point involved.—Ed.

²The case is likewise reported in 7 Am. Dec. 299, and see note, 302.—Ed.

run, and his board; and he said he understood, from all parties, that *Vanderlip* was to have 3 cents per run, and work $10\frac{1}{2}$ months. In an additional return, it was stated by the justice, that it was understood by him, and he believed by the jury, that the plaintiff below left the service of the defendants below, at the date of the account; though he did not recollect that it was either proved or admitted. The jury found a verdict for the plaintiff below, for 22 dollars and 35 cents; on which the justice gave judgment.

SPENCER, J., delivered the opinion of the Court. The question is, whether the contract of the defendant in error is an entire contract, operating as a condition precedent; and, as such, necessary to be performed before the plaintiffs in error were liable; or whether we are to consider the agreement, to pay three cents per run, as a distinct agreement, on the one side, and the promise to work for $10\frac{1}{2}$ months, as independent and unconnected with the rate at which the defendant in error was to spin the yarn. It has been well observed by Serjeant *Williams*, in a note to *Pordage and Cole*, 1 Saun. 320. note 4, that the old cases proceeded on very subtle and nice distinctions; and it might have been added, that some of them were carried to a length that worked great injustice, and defeated the intentions and understandings of men, not versed in nice and technical rules. To show to what unreasonable results the Courts arrived, I will barely mention two cases. *A.* agreed to serve *B.* a year, and *B.* agreed to pay him 10 pounds; and it was held, *A.* might maintain an action against *B.* for the money, before any service. Again, *A.* covenanted with *B.* to marry his daughter; and *B.* covenanted to convey an estate to *A.* and the daughter, in special tail; though *A.* marry another woman, or the daughter marries another man, *A.* may maintain an action against *B.* on the covenant.

The good sense of modern times has exploded these subtle notions; and contracts are now expounded according to the real intention of the parties: thus, in *Waddington v. Oliver*, 5 Bos. and Puller, 2 N. S. 61, the plaintiff sold the defendant 100 bags of hops, at 56 shillings per hundred, to be delivered on or before 1st *January*, 1805, as might be agreeable to the plaintiff. On the 12th of *December*, twelve bags were delivered, and payment was immediately demanded; and on refusal to pay, a suit was brought. The Court were clearly of opinion, that the contract was entire, and could not be split; and that the plaintiff had no right to bring an action until the whole quantity was delivered, or until the time for delivery of the whole had arrived. The 3d note of Serjeant *Williams* to 2d Saun. 352, furnishes a variety of cases, showing the grounds on which the latter cases have placed the dependency or independency of contracts. There are many distinctions, not necessary now to be noticed; but the object of them is to promote substantial justice, by ascertaining the intention of the par-

ties, and carrying them into effect, without a literal adherence to words, or the order of sentences.

It is evident to my mind, that the parties before us intended that *Vanderlip* should serve the *M'Millans* for 10½ months, and that he should be paid 3 cents for each run of yarn spun by him; and that they intended this as one entire contract. The *M'Millans* could not mean to have paid by the run; and to subject themselves to a suit, *toties quoties*. We have a right to infer from the plaintiff's declaration in the Court below, as well as from the fact that one of the witnesses was to have 5 cents a run, that *Vanderlip* was a novitiate in spinning; and, consequently, that he would be more profitable to his employers in the latter part of the term. If the contract was entire, and looked as well to the price *per* run, as to the time of service, it necessarily formed a condition precedent; and then, *Vanderlip* could not sue until he had performed his contract of service, or until the period within which it was to be performed had elapsed.

The latter qualification is drawn from the case of *Waddington v. Oliver*: though, I confess, I do not perceive the grounds on which it rests. It appears to me, that the construction I have put on this contract, is not only warranted by the agreement itself, but that it is a very useful and salutary one. The general practice, in hiring laborers or artisans, is, for 6 or 12 months, at so much per month: the farmer hires a man for 6 or 12 months, at monthly wages; and he takes his chance of the good, with the bad months. It is well known, that the labor of a man, during the summer months, is worth double the labor of the same man in winter; but upon the principles contended for by the defendant's counsel, if the farmer hires in the autumn, for twelve months, at monthly wages, the laborer may quit his employ on the first of *May*, and sue for his wages, and recover them; leaving the farmer the poor resort of a suit for damages. The rule contended for holds out temptations to men to violate their contracts. The stipulation of monthly pay, or, in this case, pay by the run, does not disjoin the contract: it is adopted as the means only of ascertaining the compensation, and does not render it less entire. The case from 1 Roll. Abr. 29. 1. 36. is a very bald case; and the case decided by *HALE*, at *Norfolk*, in 1662, 1 Com. Dig. Action, F., is a very unreasonable decision. The contract was to deliver so much corn, before *Michaelmas*, for so much the *coomb*; and a part only was delivered; and he ruled, that *assumpsit* lay for so much, after *Michaelmas*; for, though the agreement was entire, the several delivery makes several contracts. When part of the corn was delivered, towards the fulfilment of an entire contract, and for the convenience of the party delivering, it is extraordinary that such delivery should have annulled the contract; but it did not; for the case adds: "and the defendant has a remedy for the residue." This could not be, unless the contract remained unaffected by the several delivery. These are cases decided before the

Courts adopted the true method of considering contracts, in relation to their dependency or independency.

The entry in the plaintiff's books proves nothing; for, certainly, they were to keep an account of the quantity spun; and if, for the defendant's accommodation, they were willing to advance cash to him, that did not vary the contract, or show that they considered themselves liable to pay before the end of the term.

Judgment reversed.¹

TURNER v. ROBINSON AND ANOTHER.

KING'S BENCH, 1833.

[5 *Barnewall and Adolphus*, 789.]

ASSUMPSIT for work and labor. At the trial before DENMAN, C. J., at the London sittings after Trinity term, 1833, the following facts appeared. The defendants were silk manufacturers; the plaintiff acted as their foreman from January to June, 1831, and sought to recover in this action a remuneration for his services during that period. The evidence as to the amount of wages was, that it had been agreed between the plaintiff and defendants, that the plaintiff was to have wages at the rate of £80 per year. In June, 1831, the

¹The principal case represents the weight though not perhaps the trend of authority in this country. Among the many authorities in accord, see the following:

Stark v. Parker (1824) 2 Pick. 267; *The Alexander* (1894) 912, 914; *Peck v. Burr* (1851) 10 N. Y. 297; *Smith v. Brady* (1858) 17 N. Y. 173 (especially the elaborate and careful opinion of Comstock, J., pp. 179-190); *Wolfe v. Howes* (1859) 20 N. Y. 197, 220; *Tipton v. Feitner* (1859) 20 N. Y. 423; *Cunningham v. Jones* (1859) 20 N. Y. 486; *Patterson v. Kelly* (1891) 14 N. Y. Supp. 118.

The principle underlying these and like decisions is admirably stated in the following passage from *Tipton v. Feitner*, *supra*: "There is another class arising out of contracts for services, where the party employed agreed to serve for a fixed period, or to execute a particular work, and was to be paid by the week, or month, or by some rule adjusted by reference to the separate parcels of the work performed, in which it has been uniformly held—except in one case, where the default was occasioned by the death of the party employed—that the whole of the service must be performed in order to warrant a recovery for any part: *McMillan v. Vanderlip*, 12 Johns. 165; *Cunningham v. Morrell* 10 *id.* 203; *Jennings v. Camp*, 13 Johns. 94; *Reab v. Moor* 19 *id.* 337; *Lantry v. Parks*, 8 Cow. 63; *Morell v. Burns*, 4 Denio, 121; *Wolfe v. Howes*, 20 N. Y. 197."

For further citation of authorities in the various jurisdictions, see Keener's *Quasi-Contracts*, 215, n. 2.

For cases contra, see note to *Britton v. Turner* (1834) 6 N. H. 481, *post*, 753, 761.—Ed.

plaintiff was dismissed by the defendants, for having advised and assisted their apprentice to quit their service and go to America, and for that, the defendants had brought an action against the plaintiff, and recovered 40s. damages. It was contended for the defendants, that it must be taken on this evidence, that the plaintiff had been hired for a year, and having been rightfully discharged from their service for misconduct during the year, was not entitled to recover wages *pro rata*, and *Spain v. Arnott* was cited. The Lord Chief Justice was of opinion that there was nothing to repel the ordinary presumption, that the servant was hired for a year; and that being so, the whole wages were forfeited before the term expired, by his misconduct, whereby the defendants were prevented from having his services for the whole year. He therefore directed a nonsuit, reserving liberty to move to enter a verdict for the plaintiff.

Law in this term moved to enter a verdict. There was no proof that the plaintiff was hired for an entire year. The evidence as to that was only that he was to have wages at the rate of £80 per year. Besides, here the defendants had already recovered against the plaintiff for his misconduct in enticing the apprentice from their service. [PARKE, J. The *prima facie* presumption was, that the plaintiff was hired for a year; and there was nothing to rebut that presumption: and having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*.]

The court¹ refused the rule.

BRITTON v. TURNER.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1834.

[6 *New Hampshire*, 481.²]

ASSUMPSIT for work and labor performed by the plaintiff, in the service of the defendant, from March 9, 1831, to December 27, 1831.

The declaration contained the common counts, and among them a count in *quantum meruit* for the labor, averring it to be worth \$100.

At the trial in the C. C. Pleas, the plaintiff proved the performance of the labor as set forth in the declaration.

The defence was that it was performed under a special contract,—that the plaintiff agreed to work one year, from some time in March,

¹DENMAN, C. J.; PARKE, TAUNTON, and PATTERSON, JJ.

And see, *Sinclair v. Bowles* (1829) 9 B. & C. 92. The principal case represents the English law on this difficult question, and is also in accord with the weight of American authority. See note to the preceding case.—Ed.

²Likewise reported in 26 Am. Dec. 713, and see note thereto, 722.—Ed.

1831, to March, 1832, and that the defendant was to pay him for said year's labor the sum of \$120; and the defendant offered evidence tending to show that such was the contract under which the work was done.

Evidence was also offered to show that the plaintiff left the defendant's service without his consent, and it was contended by the defendant that the plaintiff had no good cause for not continuing in his employment.

There was no evidence offered of any damage arising from the plaintiff's departure, farther than was to be inferred from his non-fulfilment of the entire contract.

The court instructed the jury, that if they were satisfied from the evidence that the labor was performed, under a contract to labor a year, for the sum of \$120, and if they were satisfied that the plaintiff labored only the time specified in the declaration, and then left the defendant's service, against his consent and without any good cause, yet the plaintiff was entitled to recover, under his *quantum meruit* count, as much as the labor he performed was reasonably worth; and under this direction the jury gave a verdict for the plaintiff for the sum of \$95.

The defendant excepted to the instructions thus given to the jury.

PARKER, J., delivered the opinion of the court.

It may be assumed, that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of \$120, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff under these circumstances recover a reasonable sum for the service he has actually performed, under the count in *quantum meruit*?

Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfil the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done towards the performance; and this has been considered the settled rule of law upon this subject.

Stark v. Parker, 2 Pick. 267; *Faxon v. Mansfield*, 2 Mass. 147; *McMillen v. Vanderlip*, 12 Johns. 165; *Jennings v. Camp*, 13 Johns. 94; *Reab v. Moor*, 19 Johns. 337; *Lantry v. Parks*, 8 Cow. 63; *Sinclair v. Bowles*, 9 B. & C. 92; *Spain v. Arnott*, 2 Stark. N. P. 256.

That such rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfilment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is \$95, if the defendant can succeed in this defence he in fact receives nearly five-sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible, damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract.

Another illustration is furnished in *Lantry v. Parks*, 8 Cow. 83. There the defendant hired the plaintiff for a year, at \$10 per month. The plaintiff worked ten and a half months, and then left, saying he would work no more for him. This was on Saturday; on Monday the plaintiff returned, and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the plaintiff on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result.

It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. 2 Stark. Ev. 97, 98; *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Congregational Meeting House in Lowell*, 8 Pick. 178; *Jewell v. Schroepfel*, 4 Cow. 564; *Hayden v. Madison*, 7 Green. 78; Bull. N. P. 139; 4 Bos. & Pul. 355; 10 Johns. 36; 13 Johns. 97; 7 East, 479.

A different doctrine seems to have been holden in *Ellis v. Hamlen*, 3 Taunt. 52, and it is apparent, in such cases, that if the house has not been built in the manner specified in the contract, the work has not been done. The party has no more performed what he contracted to perform, than he who has contracted to labor for a certain period, and failed to complete the time.

It is in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which it is held he cannot do.

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it,—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value; whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but

because circumstances compel him to accept it such as it is, that he should pay for the value of the house.

Where goods are sold upon a special contract as to their nature, quality, and price, and have been used before their inferiority has been discovered, or other circumstances have occurred which have rendered it impracticable or inconvenient for the vendee to rescind the contract *in toto*, it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered by a cross action damages for the breach of the contract. "But according to the later and more convenient practice, the vendee in such case is allowed, in an action for the price, to give evidence of the inferiority of the goods, in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefits which the defendant has actually derived from the goods; and where the latter has derived no benefit, the plaintiff cannot recover at all." 2 Stark. Ev. 640, 642; *Okell v. Smith*, 1 Stark. N. P. 107.

So where a person contracts for the purchase of a quantity of merchandise, at a certain price, and receives a delivery of part only, and he keeps that part, without any offer of a return, it has been held that he must pay the value of it. *Shipton v. Casson*, 5 B. & C.; *Baker v. Sutton*, Com. Dig. Action F: 1 Camp. 55, note.

A different opinion seems to have been entertained (*Waddington v. Oliver*, 5 B. & P. 61), and a different decision was had. *Walker v. Dixon*, 2 Stark. N. P. 281.

There is a close analogy between all these classes of cases, in which such diverse decisions have been made.

If the party who has contracted to receive merchandise, takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor in part, under similar circumstances, should pay the value of what has been done for his benefit.

It is said that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance.

If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes

the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed.

In neither case has the contract been performed. In neither can an action be sustained on the original contract.

In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished.

We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320, c.; 2 Stark. Ev. 643.

It is as "hard upon the plaintiff to preclude him from recovering at all, because he has failed as to part of his entire undertaking," where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed.

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. Taft v. Montague, 14 Mass. 282; 2 Stark. Ev. 644.

But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party. the labor actually done, and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane's Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse

to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value,—takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. *Farnsworth v. Garrard*, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case,—it has still been received by his assent.

In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service,—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. *Boone v. Eyre*, 1 H. Bl. 273, n.; *Campbell v. Jones*, 6 D. & E. 570; *Ritchie v. Atkinson*, 10 East, 295; *Burn v. Miller*, 4 Taunt. 745.

It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretence for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth,

or the amount of advantage he receives upon the whole transaction. *Wadleigh v. Sutton*, 6 N. H. 15. And, in estimating the value of the labor, the contract price for the service cannot be exceeded. 7 Green. 78; *Dubois v. Delaware & Hudson Canal Company*, 4 Wend. 285; *Koon v. Greenman*, 7 Wend. 121.

If a person makes a contract fairly he is entitled to have it fully performed, and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damages sustained by the non-performance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence he is entitled so to do, and the implied promise which the law will raise in such case, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

If in such case it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions.

There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be. *Crowninshield v. Robinson*, 1 Mason.

And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for farther damages.

Applying the principles thus laid down to this case, the plaintiff is entitled to judgment on the verdict.

The defendant sets up a mere breach of the contract in defence

of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct, that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appear to have allowed a *pro rata* compensation, for the time which the plaintiff labored in the defendant's service.

As the defendant has not claimed or had any adjustment of damages, for the breach of the contract, in this action, if he has actually sustained damage he is still entitled to a suit to recover the amount.

Whether it is not necessary, in cases of this kind, that notice should be given to the employer that the contract is abandoned, with an offer of adjustment and demand of payment; and whether the laborer must not wait until the time when the money would have been due according to the contract, before commencing an action (5 B. & P.) are questions not necessary to be settled in this case, no objections of that nature having been taken here.

Judgment on the verdict.¹

"Whatever might be the views of the court as at present organized, in a case like that of *Britton v. Turner*, and however much, even, some may think it is to be regretted that the rule of law there laid down was allowed to obtain, still, considering that it has remained as the law of the State for nearly twenty years, and has never been overruled, and that while it has the strong feature of its direct tendency to the wilful and careless violation of express contracts fairly entered into, to lead to its condemnation and disapproval, it has also some features of advantage and strong justice to recommend it. We, on the whole, are not inclined to disturb the doctrines of that case, but to adopt and apply them." Woods, C. J., in *Davis v. Barrington*, 30 N. H. 517, 529.

And see the valuable note on the doctrine of the principal case as a note to *Hayward v. Leonard* (1828) 7 Pick. 181, as reported in 19 Am. Dec. 268, 272-282.

The following jurisdictions seem to have adopted the doctrine of the principal case: *Pixler v. Nichols* (1859) 8 Ia. 106; *Wheatley v. Miscal* (1854) 5 Ind. 142 (infant's services); *Duncan v. Baker* (1878) 21 Kas. 991; *Sheldon v. Leahy* (1896) 111 Mich. 29; *Parcell v. McComber* (1886) 95 N. C. 98; *Carroll v. Welch* (1861) 26 Tex. 147.

The weight of authority is clearly against *Britton v. Turner*, *supra*; but the reason of the thing and the trend of legal development are clearly in favor of it.

In *Gorman v. Bellamy* (1880) 82 N. C. 496, 500, the court said: "The inclination of the courts is to relax the stringent rules of the common law which allows no recovery upon a special unperformed contract itself, nor for the value of the work done because the special excludes an implied contract to pay. In such case if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. 'The law, therefore, implies a promise,' say the court, 'to pay such remuneration as the benefit conferred is really worth.'"

And in *McClay v. Hedges* (1864) 18 Ia. 66, 68, DILLON, J., used the follow-

ing just and weighty language: "This question was settled in this State by the case of *Pixler v. Nichols*, 8 Ia. 106, which distinctly recognized and expressly followed the case of *Britton v. Turner*, 6 N. H. 481. That celebrated case has been criticised, doubted and denied to be law. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the old cases."—ED.

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— of performance is a good defence to an action for recovery of money, if the contract is inseparable and partly performed, 611-613; if, however, the contract is wholly unperformed, so that failure of consideration is total, recovery is permitted even in English law, 615.

— of performance excuses plaintiff and he may recover the reasonable value of his services on a *quantum meruit*, 621, 627; but if complete performance be a condition precedent to any payment, recovery is refused in England, *Cutter v. Powell*, 632. Recovery should, however, be permitted in such cases according to the value of the services actually performed and received by defendant as in *Parker v. Macomber*, 636-640 and note.

— of performance produced by destruction of the subject matter excuses plaintiff's performance and permits recovery on a *quantum meruit*, 643, 646, 652-654. If complete performance be a condition precedent to payment, the English law refuses recovery, 646, note.

Improvements placed upon defendant's property in the reasonable belief that the property belonged in law to the plaintiff, not recoverable at law in the absence of statute (termed Betterment Acts, which see), 307-312, 321-322; but recovery of value of such improvements was always allowed on a bill in equity in which the maker of the improvements in question was

defendant, note 312. In some jurisdictions the plaintiff is allowed affirmative relief as plaintiff in equity, 313-322. By so-called "Betterment Acts," recovery is now usually allowed at law, 323-328.

Indemnity in suretyship is quasi-contractual in its origin and nature, 250 *et seq.*

Infant's liability for necessities is quasi-contractual, not contractual, 438, note, and infant retaining benefit should be liable therefor like any adult, sane or insane, as quasi-contract rests upon duty of restitution not upon agreement of parties, 437.

Innkeeper's liability is quasi-contractual, 26, note 26-27.

Insane person's liability is quasi-contractual not contractual as all elements essential to formation of a contract are absent. *Sceva v. True*, 75-80. The same is true in a lesser degree of the liability of infants and married women unless modified by statute.

Institutes of Justinian, 1.

Insurance of goods not on board or where risk has not attached may be recovered, 407-412 and note.

— of life of person, where default is made in payment of premises, 627-631.

Interest paid by mistake cannot be recovered with the intention of the parties was to pay interest; but the instrument failed to provide for its payment, as it is not dishonest or unconscientious for the defendant to retain the money so paid, 551.

— upon a judgment is quasi-contractual, 33, note.

Involuntary payments, the result of duress may be recovered with or without protest, 170-189, 217, note.

Judgment in the civil law, 26, note.

— is a quasi-contract, not a contract in the strict sense of the term, 19-25, 49-56, 64-68; if judgment arises upon a tort, then it is clearly not a contract, 22-25; if upon a contract, then judgment partakes so far of the nature of a contract as to fall within the Federal protection of contracts against State impairment (Constn. U. S. Art. 1. sec. 10) notes, 25-26.

— subsequently reversed gives right of action for money paid thereunder, 206, note.

Justinian—Institutes of, 1.

Laches held a bar to recovery on change of position, 572.

Legal process, compulsion of, 189-227.

Limitations (statute of) in quasi-contract, 42-56; in cases of demand, 560-564.

Locus poenitentiae in illegal contracts, *Tappenden v. Randall*, 663, note, 665-666.

Maine, Sir Henry Sumner, quasi-contract in Roman and common law, 17.

Mansfield, Lord, as creator of English law of quasi-contract, 4-12, note, 13.

Measure of recovery in cases of wilful default of defendant is in some jurisdictions the contract price; or a sum not exceeding the contract price; in others, the real value of the services, 726-735 and notes.

— of recovery in quasi-contract, 127-130.

Mistake—as to law or fact, 352-406.

- as to creation of a contract, 407-438.
- of law ordinarily is not relieved against in courts of law or equity, since the decision in *Bilbie v. Lumley*, 1802, 352-406.
- by officers of court are relieved against on the two-fold ground that courts should show good example and should correct their own mistakes as well as mistakes of their officers, 396-399 and note.
- and the relief granted therefor in courts of equity, notes 406-409.
- of foreign law considered a mistake of fact and therefore relievable in appropriate cases, 384-393.
- of law, not relieved against in Georgia and S. Carolina, but ignorance of law affords ground for relief, 368-376, note, 376.
- of law as well as fact relieved against in Connecticut, 376-382, and Kentucky, 382, note.
- of law in a doubtful point in a compromise will not, in absence of fraud, vitiate the compromise, 399-404.
- of a government official, 393-395 and note 395-396.
- as to existence of debt permits recovery, 515; or if greater amount has been paid through mistake, excess is recoverable, 518, 522.
- of fact, considerations affecting a recovery therefor, 541-591.
- as to a collateral fact is immaterial, and therefore affords no ground for recovery, 524-541.
- as to the subject matter of a contract, 439-541.
- as to existence or identity of contract, 439-460. If not existent, and the object is bought as existent, the money so paid is recoverable, 450-452. If real estate with house thereon is purchased and house is destroyed without fault of either party, law places loss on vendor, while equity places the loss on the purchaser, 453-457, and note 457-458.
- as to validity, amount of claim, or as to collateral fact, 483-541.
- may be as to title of vendor, 460-482.

Money extorted to protect business may be recovered, 182-184.

- had and received only lies where defendant has received money or its equivalent, 107, 111, 114; is equitable in its nature, 4, 34, note, 37, 546; is really a bill in equity in a common law court, 546.
- paid as a premium when no goods are on board may be recovered, 407; so where goods are on board, but risk failed to attach, 410-412, note.
- received by unauthorized agent is recoverable from the principal provided such principal has had benefit thereof, 415-422, 425-427; contra, 413, 423.

Mortgage of future acquired property, while invalid at law, is valid in equity, so that future acquired property passing on foreclosure to the mortgagee may not be recovered in quasi-contract, 549 and note 550-551.

Moses *v.* Macferlan as source of quasi-contract, 4.

- *v.* Macferlan and its relation to Roman law, 9.

Negative enrichment—that is a mere saving does not support a recovery against estate of deceased tort-feasor, note, 99 (last paragraph).

Negligence no bar to recovery, 582-591.

Negotiorum gestio, as source of quasi-contract in Roman and common law, 1-4, 16, 18, 37-41 and note, 40-41. In admiralty law, 41, note.

Official duty as a source of quasi-contract, 18, 29-31.

- Partnership money received on specialty of one partner, who was neither authorized nor ratified to bind firm by instrument under seal, should be recovered if partnership actually received and retained benefit of the transaction, 414. Recovery would seem to be wrongly and inequitably to be denied in such cases, 413.
- Patent right is taken at risk of the purchaser, and failure of patent is, in absence of fraud or other evidence of fair dealing, no ground for recovery at law. In quasi-contract recovery might well be permitted, 428-432.
- Payment under protest, 217, note.
- in discharge of an obligation, 227-279.
 - made by stranger, without antecedent request or subsequent ratification by debtor, should nevertheless render debtor liable for the benefit actually accruing to him by such payment, 280.
 - of an obligation of third party gives right of recovery, 228.
- Position—change of by either party as affecting recovery, 568-581.
- Positive enrichment is required in order to tax estate of deceased, 85-100; a negative enrichment, that is, a mere saving, does not suffice according to weight of authority, 99, note; but reason is clearly in its favor, and authority is not lacking for its support, 104-106.
- Present in contemplation of marriage, held recoverable, 283.
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- Process—compulsion of, 189-227.
- Property—money extorted for protection to, or for possession thereof, may be recovered, 170-189.
- Protest its importance or necessity, 217, note.
- Purchase for value is a good defence to an action for recovery of money, 591-602.
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- Quasi-Contract—its origin and history, 1-18; its sources in English law, 18; its extent and nature, Chap. III., 9-41; as affected by Statute of Limitations, 42-56; as affected by set-off and counterclaim, attachment and arrest, 56-75; wherein it differs from pure contract, 75-84; wherein it differs from a tort, 85-106.
- Rescission and repudiation of contract, 717-719, notes; 725-727, notes; 729-732 and notes, 732-734. In these references the necessary elements and the measure of damages are considered.
- Recognizance as source of quasi-contract, 26, note.
- Record as a source of quasi-contract, 18, 19-25.
- Recovery for mistake of fact, considerations affecting, 541-591.
- lies for mistake of fact only when defendant has received money or its equivalent which *ex aquo et bono*, he may not retain, 541-560.
- Remedies election of, 137-153, especially notes 148-151; 153-155.
- Repudiation of contract, see heading: Rescission and repudiation of contract.
- Roman Law as source of English law of quasi-contract, 1, 4, 9, 12, 13, 16, 17, 187. *Bright v. Boyd*, 313.
- Salvage is quasi-contractual, 16, 41, note.

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- Sealed instruments and measure of recovery for breach thereof, 718-719, note; Wellston Coal Co. v. Franklin Paper Co., 729-732, and note to the case.
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- Set-off in quasi-contract, 56-62.
- Sickness of plaintiff, or presence of epidemic or contagious disease, excuses performance, and recovery may be had for the reasonable value of the services already performed, 636-640 and note.
- Smith, Adam, nature of quasi-contract, 12.
- Statute as source of quasi-contract, 18, 32-33, 56-62.
 — of Limitations in quasi-contract, 42-56; 560-568.
 — of Limitations begins to run from time of payment, not from demand, 560-564; but this is questioned and limited to cases in which defendant acted tortiously or dishonestly, 564-568.
- Statute of Frauds and the three theories concerning recovery or non-recovery, 687, note.
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- Suretyship—right of contribution in—is quasi-contractual, 250 *et seq.*
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- Survivorship of actions depends upon the fact whether estate of defendant has been positively benefited by the tort, 85-106. A mere saving is not regarded in law as a positive benefit so as to permit action against the estate, but there is a tendency this way, 104-106. Of course a recovery should be permitted on theory. In equity where there has been a fiduciary relation, survivorship obtains irrespective of benefit, note, 92-93.
- Tax—payment of illegal—and right of recovery, 204-227.
- Tenants in common cannot sue one another in *assumpsit* at common law; their remedy is (in absence of statute) by a bill in equity, 296-299, note.
- Tort, wherein it differs from quasi-contract, 85-106.
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- Usury—recovery for usurious payment, 154-158 and note.

- Voluntary payment—what is and what is not, 204-227, especially note 212-215, 217, note
- Waiver of tort action, 106-137; but survivorship is only permitted where defendant or defendant's estate has received a positive benefit in money or its equivalent.
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- vendor by modern law warrants title to goods sold in usual course, 467-471; but one dealing with a pawnbroker takes (in absence of statute to the contrary) subject to all infirmities of title, 462-467.
- Wife held not liable for goods furnished her after death of husband, and in ignorance thereof, in absence of a special contract, 434-437.
- should be permitted to recover services as housekeeper where she sustained relations of wife and acted in good faith, although tort-feasor had a previous wife living at the time, 344 and note 348.
 - taking advantage of coverture to repudiate contract should return consideration received, 433; and the same as to infant, 437-438 and note.
- Wilful and inexcusable default of plaintiff is no bar to recovery, but the measure of recovery in such case should be the value of plaintiff's services as against defendant's damages for non-performance, *Britton v. Turner*, 753-762.
- and inexcusable default of plaintiff prevents recovery by weight of authority, 736-746.
 - default of defendant gives plaintiff a right to recovery, but plaintiff must return any object of value received under the contract broken, *Miner v. Bradley*, 723, 726, note.
 - default permits recovery in some jurisdictions according to contract price; in others and according to better reasons, recovery is based upon the value of the services rendered, irrespective of the contract price, 726-735.
 - default in performance of a contract permits plaintiff to recover reasonable value of services against a defendant in default, or plaintiff may sue on contract for damages if he prefers, 713-735.
 - default of plaintiff does not prevent recovery according to English law for goods received and retained by defendant after the plaintiff's breach, 735-737; otherwise in contracts for personal services, 752-753.
 - default of plaintiff held to bar his recovery, if performance for stated time or the completion of certain amount of work be a condition precedent to any payment, 749-753.
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